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CASES AND STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. } No. 630.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a civil proceeding by the United States against the Chicago, Burlington & Quincy Railroad Company to recover $300 as penalties for three alleged violations of the safety-appliance act approved March 2, 1893 (c. 196, 27 Stat., 531), as amended March 2, 1903 (c. 976, 32 Stat., 943).

Suit was brought in the United States District Court for the Western District of Missouri to recover for four alleged violations of the safety-appliance act. Judgment in favor of the Government was rendered by this court on the first of the four

causes of action alleged in the petition, which judgment was affirmed by the Circuit Court of Appeals.

The District Court directed a verdict for the Government on the other three causes of action, which judgment was reversed by the Circuit Court of Appeals and the case remanded with directions to grant a new trial. (211 Fed., 12.) It is the latter judgment which is brought here for review.

QUESTION PRESENTED.

The question involved is whether the provisions of the safety-appliance acts making it unlawful for an interstate carrier to "run any train," not equipped with and having in operation power brakes as required by the acts, "on any railroad engaged in interstate commerce" are applicable to transfer trains of the character hereinafter described.

STATEMENT OF THE FACTS.

Defendant is and was a railroad company engaged in interstate commerce. At Kansas City, Mo., it had two freight yards, one, known as the Twelfth Street yard, south of the Missouri River, and the other, the Murray yard, north of that river. The yards are 2 or 3 miles apart at their nearest points. (R. 13, 69.) Trains entering Kansas City from the West are received and broken up at the Twelfth Street yard, and cars destined for eastern points and for delivery to connecting carriers are placed upon its distributing and classifying tracks. Trains of these cars are

then made up and transferred, without further switching or stops (R. p. 72), by switching engines to points 4 or 5 miles away in the Murray yard (R. 13), where they are redistributed and reclassified according to destination. For trains received and broken up at the Murray yard the operation is simply reversed. (R. 68.) These transfer trains are operated by their own crews, are drawn by a switch engine, carry no caboose or markers, and are run on no fixed schedule. (R. 67, 68.) For a distance of about 1 mile they pass over defendant's main line, running ahead or behind express and through trains, and, for the whole distance from yard to yard, pass over tracks used by defendant's through freight trains. (R. 70, 72.) They cross the tracks of the Union Depot, those of the Frisco system, twelve or fifteen tracks of a terminal company, and the switch lines of packing houses. (R. 72, 73.) For a distance of 3,000 feet they pass over a railroad bridge, spanning the Missouri River, upon a single track, which is used for interstate freight and passenger traffic, not only by the defendant company, but by three other railroads entering and leaving Kansas City—the Rock Island, the Wabash, and the Quincy, Omaha & Kansas City. (R. 53, 54.)

The three transfer trains complained of in this case were moving cars engaged in interstate commerce over an interstate highway, and were composed of 42, 36, and 39 cars, respectively, of which only 9, 10, and 10, respectively, had the

power brakes in operation. (R. 14, 20, 22.) If the safety appliance act is applicable to such trains, none of them had the requisite number of power brakes in operation.

SPECIFICATION OF ERROR.

The Government maintains that the Circuit Court of Appeals erred in reversing the judgment of the trial court, directing a verdict in its favor, and in holding that the transfer movements in question were switching operations and not within the purview of the safety appliance acts.

ARGUMENT.

The pertinent parts of the safety appliance act and the amendment of 1903 are as follows:

> * * * It shall be unlawful for any common carrier engaged in interstate commerce * * * to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Sec. 1, act of Mar. 2, 1893; c. 196, 27 Stat., 531.)
>
> * * * the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia,

> and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith. * * * (Sec. 1, amendment of Mar. 2, 1903; c. 976, 32 Stat., 943.)
>
> That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. * * * (Sec. 2, amendment of Mar. 2, 1903, c. 976, 32 Stat., 943.)

The Interstate Commerce Commission, pursuant to section 2 of the amendment of 1903, promulgated an order increasing the percentage of cars that should have their power brakes in operation to 75 per cent of the cars in a train. (11 I. C. C. 430, 437.) It is admitted, however, that none of the transfer trains in question had even 50 per cent of the power brakes in use.

The character and movements of the transfer trains under consideration have been described. Whether the acts are applicable to such trains is the question here presented.

Defendant contends that the words "any train" used in the act do not include transfer trains, but are limited to road trains.

There are no words in the statute limiting its application to road trains only, and the courts have refused to give the act a narrow meaning.

> Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. (Syllabus, *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *Southern Ry. Co.* v. *United States*, 222 U. S., 20; *Pennell* v. *Philadelphia & Reading Ry.*, 231 U. S., 675.)

In commenting upon the three cases cited above, Mr. Justice Pitney, in a recent case construing the safety appliance acts, says:

> In each of these cases the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented. (*Southern Ry. Co.* v. *Crockett*, 234 U. S. 725, 735.)

The court, in the *Johnson* case (p. 18), quote with approval the following from the opinion of Mr. Justice Story in the case of *United States* v. *Winn* (3 Sumn. 209, 211):

> But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving

> them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.

These transfer trains certainly fall within the meaning of the word "train" as commonly understood and as defined by the courts. (*Railway Company* v. *Hackett*, 228 U. S. 559; *Dacey* v. *Old Colony Ry. Co.*, 153 Mass. 112; *United States* v. *Pere Marquette R. Co.*, 211 Fed. 220, 222.)

The Circuit Court of Appeals for the Third Circuit, in a similar case, which was brought to this court for review and recently argued here, said:

> Of course, 35 cars coupled together and drawn by a locomotive make a train, for such connected cars are drawn and follow in the engine's train. (*Erie Railroad Co.* v. *United States*, 197 Fed. 287, 291.)

In the instant case the Circuit Court of Appeals for the Eighth Circuit said:

> The word "train" of course covers any string of cars hauled by an engine. (*Chicago, Burlington & Quincy R. R. Co.* v. *United States*, 211 Fed., 12, 18.)

The letter of the statute, therefore, undoubtedly includes transfer trains of the character described. It is submitted that such trains also fall within the spirit of the act.

The primary object of the safety appliance act is to promote the public welfare by securing the safety of employees and travelers. (*Johnson* v. *Southern Pacific Company*, 196 U. S., 1.) It is just as necessary for the accomplishment of this pur-

pose that transfer trains, moving over a portion of the main line of the carrier, which, as Judge Hook says, in the dissenting opinion in this case, is " one of the important and most congested arteries of commerce in that part of the country," and traversing a score or more of passenger tracks, should be equipped with and have in operation a sufficient number of power brakes, as that road trains using the same track should be so equipped.

Under modern railroad conditions, transfer trains are constantly moving between switching yards over considerable stretches of main-line track, passing over bridges and grades, through tunnels, under overhead obstructions, and over switches and railroad crossings. If it should be held that such movements are not within the contemplation of the act, a great number of employees operating such transfer trains will be unfairly exposed to dangers against which like employees on road trains are protected, and interstate traffic, both passenger and freight, will be subjected to dangers which the act sought to remove.

It is submitted that the act does not contemplate any such result. There are no words therein which would justify such construction. On the contrary, the language of the act is very broad, and as amended in 1903 provides that it—

> shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. (C. 976, 32 Stat., 943.)

This court has held, whether the car be on the main line or switch track, that the statute imposes a positive and absolute duty upon the carrier to maintain in good condition at all times such safety appliances as automatic couplers, grab irons, drawbars, etc. (*Southern Ry. Co.* v. *Crockett,* 234 U. S., 725; *Delk* v. *St. Louis & San Francisco R. R. Co.,* 220 U. S., 580; *Chicago, Burlington & Quincy Ry.* v. *United States,* 220 U. S., 559; *St. Louis, I. M. & S. Ry.* v. *Taylor,* 210 U. S., 281.)

This court has also held, in the language used by Mr. Justice Van Devanter in the case of the *United States* v. *A., T. & S. F. Ry. Co.,* 163 Fed., 517, that:

> Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty. (*Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S., 559, 577.)

Appropriately, therefore, the argument may proceed in the following words of Judge Sessions:

> Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed,

> in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combination of cars, and in the other a single car. (*United States* v. *Pere Marquette R. Co.*, 211 Fed., 220, 223.)

The Circuit Court of Appeals for the Seventh Circuit have held in a case very similar to this one that the statute was applicable to transfer trains.

The facts in that case, as found by the court, were as follows:

> Less than the required number of cars in the train had air brakes under the control of the engineer. Corwith is an outer Chicago yard, where incoming trains used in interstate traffic are stopped and the cars distributed upon various tracks. Cars that are destined to plaintiff in error's inner yard at Eighteenth Street are assembled at Corwith into a train and moved about 8 miles to Eighteenth Street over switch tracks, leads, and main tracks of plaintiff in error, across a drawbridge and three railroads, at the rate of 6 to 8 miles per hour. Beyond Corwith the trains are under the jurisdiction of the train dispatcher; between Corwith and the Eighteenth Street yard, of the yardmaster. At Corwith the regular "road" crews give up the trains, and from there to Eighteenth Street trains are handled by "switching" crews. From Corwith to Eighteenth Street the railroad is wholly within Cook County, Ill.

Upon these facts the court held:

> * * * that such section (section 1 of the safety appliance act) was not limited to road trains, but applied to interstate trains, destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew. (Syllabus, *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 198 Fed., 637.)

If movements of transfer trains between yards expose their trainmen, the public, and interstate commerce, to the dangers from which Congress sought to exclude them, the length of the haul is immaterial and the air brake provision of the statute are applicable whether it be 2 or 20 miles.

The Circuit Court of Appeals for the Eighth Circuit has held that the length of the haul is immaterial where a car with a defective coupler was being hauled by a carrier. (*United States* v. *Denver & Rio Grande R. R. Co.,* 163 Fed., 519, 521.)

The Court of Appeals for the Third Circuit thus declare the purpose of the statute:

> It is to lessen the danger incident to such service, to averting collisions, to control train movements on grades, to obviate as far as possible the danger to men of working hand brakes on icy footings, and other dangers incident to road conditions, that this statute was meant to cover. (*Erie R. Co.* v. *United States,* 197 Fed., 287, 290.)

All of the dangers referred to were present in the movements of the transfer trains in question.

The purpose of the act being to guard against the dangers described, it would appear that, in pursuance of the obvious intention of Congress, transfer movements to which such dangers are incident should not be excluded from the protection of the act except by express language demanding such construction. As we have seen, none such exists.

The Court of Appeals, in the instant case, however, first read into the act an exception excluding bona fide switching movements from its operation. They then hold that the two distinct yards, located several miles apart, constitute a " terminal yard " and that any interyard movement, regardless of its nature, within such switching yard is a bona fide switching movement. From these premises they deduce the conclusion that, since the transfer trains in question moved within this switching unity, their interyard movements were bona fide switching operations and not within the statute, although there was no switching or change of make-up of these drags of cars during the transit alleged in plaintiff's declaration.

In this connection, Judge Hook, in the dissenting opinion in this case, says:

> * * * It is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. The test of the application of the statute is in the essential nature of the conditions presented, not in the

> words by which they may be conveniently described. * * * It is noteworthy that the phrase " switching operations " does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. * * * In the passage of the trains all the dangers were present as patently as if they had been solid through trains from distant cities, as to which no one would doubt the applicability of the statute. (*Chicago, B. & Q. R. Co.* v. *United States,* 211 Fed., 12, 20, 21.)

The court complain that " This case was tried mainly by the dictionary," because the Government claimed that transfer trains of the character described came within the expression " all trains * * * used on any railroad engaged in interstate commerce," yet they build up their whole argument upon mere definitions, given by them to the words " switching operations " and switching or " terminal yards," which nowhere appear in the act.

The Government agrees that " it is not a wrangle over mere names " and maintains that the question whether or not a bona fide switching movement falls within the act is not present in this case, but that the question presented is—Do the movements, by whatever name described, of said transfer trains, expose their trainmen, the public, and interstate commerce to the dangers from which Congress sought and intended to exclude them?

The court also laid great stress upon the supposed hardship entailed by construing the statute to include transfer trains.

> To this we reply that if it be the true construction, its harshness is no concern of the courts. (*St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S., 281, 295.)

However, the hardship is more apparent than real. The coupling of air brakes on transfer trains would require little time, especially if done by additional yardmen reserved for the purpose and if no tests were made. Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since most of the cars constituting these transfer trains were moving in through traffic and supposedly had been previously inspected and found to be in good condition.

Furthermore, the record shows that defendant operated some of the power brakes on all of the trains in question, though not the number required by the statutes, thus recognizing the necessity of having the trains under the control of the engineer. It differed with the Interstate Commerce Commission only as to the number of cars which should be so operated during transfer movements. The determination of this question, however, was by the statute left not to the railroad but to the commission, whose decision is final.

ORDER OF INTERSTATE COMMERCE COMMISSION LEGAL.

In the court below defendant contended that the order of the Interstate Commerce Commission in-

creasing the minimum percentage of cars required to be operated with power brakes was not put in evidence and that the court could not take judicial cognizance thereof. This question was not raised in the trial court, but the case was tried upon the theory that the order was before the court, as, in fact, it was. However, the objection is not well taken, since this court has held that Federal courts may take judicial notice of rules and regulations of executive departments promulgated by authority of acts of Congress. (*Caha* v. *United States,* 152 U. S., 211, 222; *Cosmos Co.* v. *Gray Eagle Co.,* 190 U. S., 301, 309.)

Defendant also contended that it was improper for the court to presume that the order of the Interstate Commerce Commission was made after a full hearing. Under the rulings of this court, this contention is likewise without merit.

> * * * It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act. (*Knox County* v. *Ninth National Bank,* 147 U. S., 91, 97; *Nofire* v. *United States,* 164 U. S., 657, 660.)

As a matter of fact, there was a full hearing. (11 I. C. C. 430.)

Defendant further claimed, in the court below, that the act authorizing the Interstate Commerce Commission to increase the percentage of cars, required to be operated by power brakes, was an un-

constitutional delegation of legislative power, and that the order of the commission was void.

In view of the repeated rulings of this court, upholding the right to delegate administrative authority to make regulations, this contention of defendant can not be maintained. (*United States* v. *Grimaud,* 220 U. S., 506; *St. Louis, I. M. & S. Ry.* v. *Taylor,* 210 U. S., 281; *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S., 194, 214, and cases therein cited; *Houston & Texas Ry.* v. *United States,* 234 U. S., 342.)

These questions, however, are immaterial, inasmuch as defendant did not comply with the statute, as unmodified by the order, none of the transfer trains in question having even 50 per cent of the cars therein operated by power brakes, as required by the act.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals erred in their interpretation of the safety-appliance acts and in reversing the judgment of the District Court directing a verdict in favor of the Government. The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. (*Delk* v. *St. Louis & San Francisco Railroad Co.,* 220 U. S., 580.)

E. MARVIN UNDERWOOD,
Assistant Attorney General.

DECEMBER, 1914.

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No. [illegible]

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

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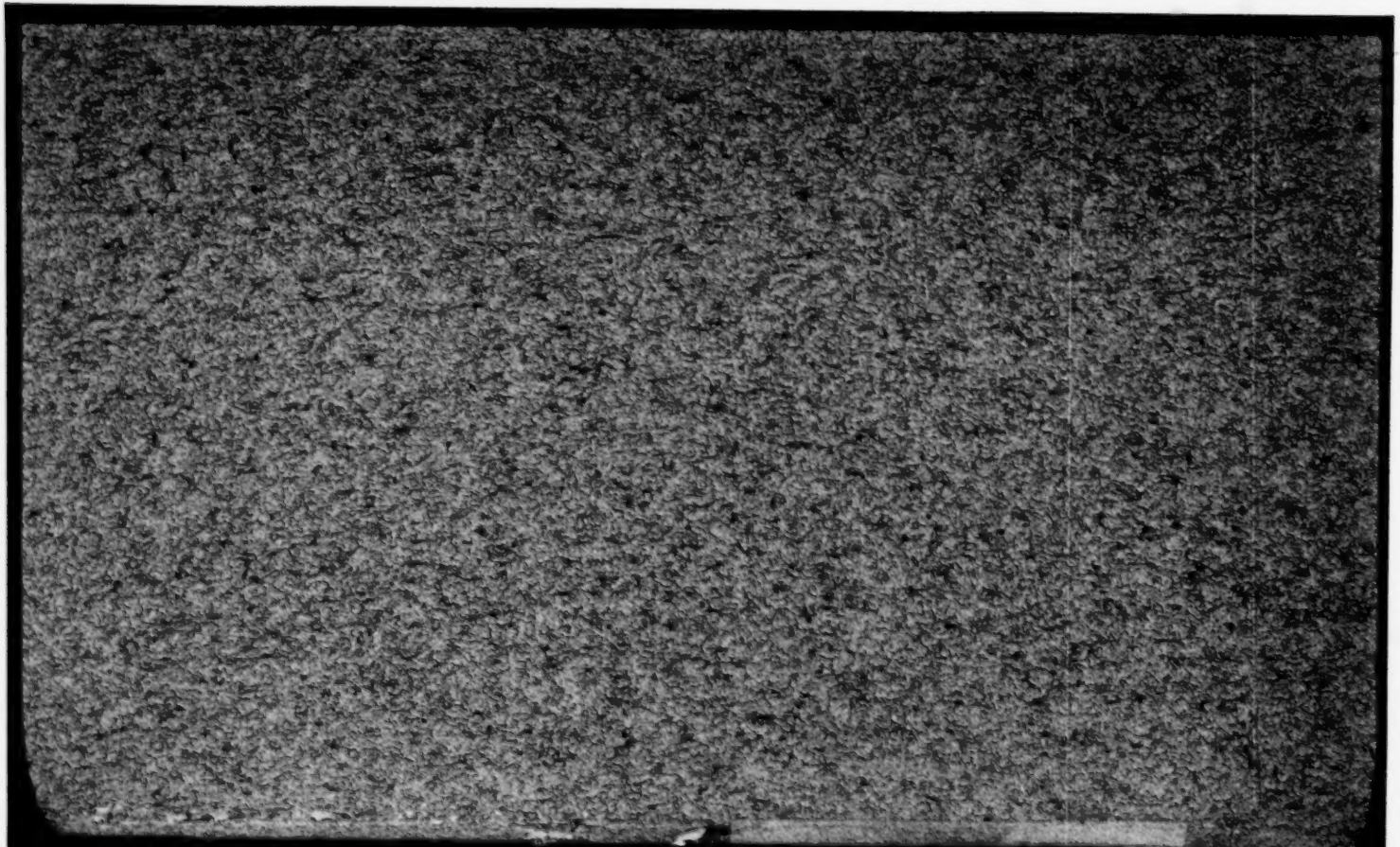

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STATEMENT OF THE CASE.

This action was instituted by the United States against the Chicago, Burlington & Quincy Railroad Company in the United States District Court for the Western Division of the Western District of Missouri, and was brought to recover penalties for alleged violations of the Federal Safety Appliance Act, approved March 2d, 1893 (27 Statutes at Large, 531), as amended by an Act ap-

proved April 1st, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2d, 1903 (32 Statutes at Large, 943).

There were four counts included in the complaint, the first being based upon an alleged violation of that part of the Safety Appliance Act prohibiting any common carrier engaged in interstate commerce from hauling on its line any *car* used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc., and the second, third and fourth counts being based upon an alleged violation of that part of the Act prohibiting any common carrier engaged in interstate commerce from *running any train* in such traffic without the use and operation of air brakes upon a specified percentage of the cars in such *train* so that the engineer on the locomotive drawing such *train* can control its *speed* without requiring *brakemen* to use the common hand brakes for that purpose.

The trial court submitted certain issues of fact to the jury under the first count, but directed a verdict against the respondent as to the second, third and fourth counts. The jury found against the respondent upon the first count, as well as upon the second, third and fourth counts, and the trial court entered judgment accordingly. Thereafter, respondent took the case to the United States Circuit Court of Appeals for the Eighth Circuit by Writ of Error, where judgment was rendered affirming the judgment of the trial court as to the first count, but reversing the judgment as to the second, third and fourth counts.

The case is pending in this court upon writ of *certiorari* granted upon the application of the United States to review the judgment of the Circuit Court of Appeals reversing the judgment of the trial court as to the second, third and fourth counts of the complaint.

The movements alleged to have been made in violation of the Safety Appliance Act in the second, third and four counts of the complaint are as follows:

In the second count, the Government charges that the respondent on August 9th, 1910, operated on its line a certain transfer train consisting of forty-two cars drawn by a locomotive engine, said transfer train being operated with power or train brakes, and being engaged in the moving of interstate commerce; that said train was so operated as aforesaid in and about Harlem, in the State of Missouri, when only nine cars in said train had their brakes used and operated by the engineer, and when all the power-braked cars associated with said nine cars did not have their brakes so used and operated, and when less than 75 per centum of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train, all in violation of the Act of Congress known as the Safety Appliance Act approved March 2d, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1st, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2d, 1903 (32 Statutes at Large, 943), and as modified by an Order of the Inter-

state Commerce Commission of November 15th, 1905 (Record, 4).

The third and fourth counts are substantially the same as the second, excepting that in the third count it is alleged that the transfer train consisted of thirty-six cars, and that on the same date said train was operated in and about Harlem, in the State of Missouri, when only ten cars of said train had their brakes used and operated by the engineer (Record, 5); and in the fourth count it is alleged that the transfer train consisted of thirty-nine cars, and that on the same date said train was operated in and about Kansas City, in the State of Missouri, when only nine cars had their brakes used and operated. In all of said counts the Government asks judgment for the amount of the *penalty* provided for in the Act (Record, 6).

The Questions Involved.

The statement of the "question presented" in the Government's Brief is vague and indefinite. We believe that a more accurate and precise statement of the questions actually involved as shown by the pleadings and evidence, and the assignments of error (Record, 95-106) presented to the United States Circuit Court of Appeals, ~~are~~ as follows:

1. What is the meaning of the word "train" as used in the Safety Appliance Act of 1893, and the amendments thereto?

2. Do the provisions of the Safety Appliance Act prohibiting carriers engaged in interstate commerce from *running any train* in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such *train* can control its *speed* without requiring the *brakemen* to use the common hand-brake for that purpose, and the amendments thereto requiring that not less than a certain per centum of the cars in such *train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train,* relate to a movement of a string or group of cars picked up a car at a time at various points within the terminal yards of a railroad, and then moved at slow speed, stopping from time to time when required by other movements in the yards, and thus passing over a single track a distance of less than a mile to another part of the same terminal yards for the purpose of distributing said cars to various *trains* that are being made up, and to various commercial houses and team tracks, it further appearing that the said strings or groups of cars are not made up as "trains" to go out on the road; that they are operated by switching crews, and not by road crews; that they are moved exclusively within the terminal yards of the company under yard rules; that notwithstanding the fact that passenger and freight trains coming in off the road and passing through the terminals pass along the said single track, such passenger and freight trains while so moving lose their schedules and are moved under yard rules at slow

speed; that said strings or groups of cars do not have cabooses or markers, as is the case with "trains" made up to go out on the road, and it appearing further that such movement from one place to another within the same terminal yards are merely extended switching movements made necessary by the increasing size of the railroad terminals.

3. Does the movement of strings of cars under the conditions last above described constitute the *running of a train* by the carrier engaged in interstate commerce *on its line,* within the meaning of the Federal Safety Appliance Act?

4. Do the air brake provisions of the Safety Appliance Act apply to extended switching operations conducted entirely within the general terminal yards of a railroad company?

STATEMENT OF THE FACTS.

The record includes the evidence relating to all of the counts of the petition. Since the judgment of the Circuit Court of Appeals upon the first count is not involved in this proceeding, a brief summary of the testimony as to the three counts of the petition involved will not be out of place.

The Government offered the testimony of only two witnesses, both inspectors of safety appliances for the Interstate Commerce Commission, George E. Starbird (Record, 12) and Elbridge L. Gibbs (Record, 32).

While all of the movements in question were in and around Kansas City, Missouri, and entirely within the State of Missouri, there is possibly sufficient evidence to show that each of the string of cars contained one or more cars loaded with interstate commerce, and it is not denied that the three strings of cars each contained the number of cars alleged, that is, 42, 36 and 39, respectively, and that only 9, 10 and 11 of the cars, respectively, had the air brakes used and operated.

The testimony of the witnesses relating to the general terminal yards at Kansas City, and the character, extent and control of the movements of cars in question, and the definition of the word "train" is as follows:

Mr. Starbird testified on behalf of the Government, upon direct examination, that the string of cars involved

in count 4 moved from the 12th Street yards in Kansas City, Missouri, past the Union Depot across the bridge to what is known as the Murry Yards of the Chicago, Burlington & Quincy Railroad Company; that the distance was between four and five miles (Record, 13) (the witness modified this statement on cross examination); that it passed upon what the witness called (by way of conclusion) the main tracks perhaps two or three miles, and went into another switching yard (Record, 14); that there were thirty-nine cars, *and they carried no caboose*, and that ten cars had the air brakes coupled and operated (Record, 14); that there were 42 cars in the string of cars referred to in the second count; that nine cars had the air brakes used and operated; that these cars were moved from the Murry Yards across the river to the 12th Street Yards; that in this movement there were cars ahead and behind the engine; that it proceeded across the single track already referred to a distance of two or three miles (Record, 20-21); that in the drag or string of cars referred to in count 3, there were 36 cars (Record, 22); that these cars were moved from Murry Yards to the 12th Street Yards, and had only 10 cars with their air brakes used and operated (Record, 22).

On cross examination, this witness testified that the string of cars involved in count 4 was made up of cars in defendant's switch yards (Record 24), and referring further to this movement the witness testified, as follows (Record, 27-28):

"Q. There is such a thing as you referred to in your testimony awhile ago, and as counsel for the Government several times referred to—a drag—what do you railroad men mean, in railroad parlance, when they say a 'drag of cars'?

A. A number of cars attached to a road or switch engine, hauled by a road engine, temporarily used in yard service, or one or more cars attached to that engine, leaving a terminal yard of the company, going in any general direction whatsoever, and cars attached to that engine destined to a yard of the same company or a connecting line, or along the main line of the company, doing industrial work, where cars in that drag separately would be sent out.

Q. Is that what they were engaged in doing?

A. No, sir; they did not set out nothing—it was a transfer train or *drag, as usually termed*, a continuous movement from the Twelfth Street yard over to the Murry yard, which is known as the train yard, and trains are made up.

Q. Have you acquired sufficient knowledge to be able to tell whether, in the operation of these drags, they are used—that is the term used when engaged in the process of switching, isn't it?

A. No, sir.

Q. It would make no difference whether switching or not?

A. No, sir; you have got to make it up into a transfer train or drag before it constitutes a train.

Q. Was this a drag?

A. It was a train made up to leave the Twelfth Street yard, destined to the Murry yard.

Q. As counsel for the Government referred to drag several times, I want to know whether you say it was a drag?

A. I call it a transfer train.

Q. Was it a drag?

A. They drug it.

Q. You used the word 'drag;' I want to know now whether you say, as an expert, it was a drag?

A. Both ways, a transfer, drag, or cut of cars.

Q. These cars I have been talking about, you tell the jury it was, in railroad parlance, known as a drag, a transfer, or a cut of cars?

A. Yes, sir; various appellations used.

Q. And you know, don't you, that the drag or transfer or cut of cars, and all those drags, transfers, or cuts of cars to which you have been testifying were being taken, if they were taken across the river, north, were taken over there for the purpose of being put into trains to be sent out over the road?

A. Yes, sir.

Q. And you know that any one of the transfers, drags or cuts of cars to which you have been testifying, which came from the north side to the south side, was being brought over, had been picked up from the yard on the north side of the river, where the trains had come in, and down there, from the different trains, and brought to the south side for the purpose of distribution to other roads or to the merchants?

A. Yes.

Q. That is what the railroad company was engaged in doing with these drags or transfers the day you have been testifying about?

A. Yes, sir.

Q. And they were all in charge, at least two of them, in charge of the same man Deere?

A. Yes, sir.

Q. And he is called the foreman of a switching crew?

* * * * * *

A. Yes, sir; foreman.

Q. He was in charge of the switching crew?

A. Yes, sir; transfer switching crew.
Q. Transfer switching crew, all right. You knew that all that time, didn't you?
A. Yes, sir."

This witness further testified on cross examination (Record, 29):

"Q. * * * *You know, and knew then, that there was neither one of those drags or cuts of cars, or transfers, that you have been referring to, as made up at the time you saw it, was not intended to go out over any railroad, except as being moved from one side of the river to the other, between what we call the switch yard, by the switch crews.*
A. *That is what I have been testifying to and so stated.*
Q. *All right. And you knew that any movement of that kind, of these drags, that was going from the south side of the river to the north side of the river, was to take them over to the Murry yard, there to be shifted about, from track to track, and switch to switch, to make up trains going different directions, and put them into the trains to which they might belong?*
A. *Yes, sir.*"

This witness testified further on cross examination, that he was not certain about the distance between the 12th Street Yard and the Murry Yard, and that he had no knowledge as to the length of the single track across the bridge and connecting the two yards; that the single track across the bridge was necessarily used by the railroad company in moving the drags of cars about which he had been testifying, in order to get from one yard

to the other, and that there was no other way for the railroad company to use or handle these drags, in the switching of them by the switching crews when they make them up intó trains or distribute them to the different railroad companies (Record, 29-30); that he did not know what the yard limits were (Record, 30).

The witness, Gibbs, the other Government inspector, testified that the distance from the 12th Street Yards to the Murry Yards was a couple of miles; that the single track crossing the bridge was what he "judged" to be a main line track, and was used by passenger and freight trains (Record, 33); that the strings of cars in question were drawn as a unit from one yard to another, but were delayed for awhile on the bridge (Record, 34).

Upon cross examination, the witness testified that "transfer drags" was the term used among railroad men to designate the strings of cars in question; that said strings of cars were not made up to go out on the road, but were going from one yard to another (Record, 34); and further that (Record, 34-35):

> "Q. And they were either assembled from different switch tracks on the south side of the river or assembled from different switch tracks on the north side of the river, to be taken to those switch yards either from the north or south side?
> A. From experience, I know that is the method commonly used.
> Q. You speak as a railroad man?
> A. Yes, sir.
> Q. And you understand that where either of these drags was made up, in the north yard, across the

river, that it was simply the assembling or getting together of cars which had come off the main lines in trains to pick them up and bring them over to the south side of the river for distribution into the switch yard down here, to the different roads?

A. That is what occurred.

Q. Or set for the merchants, set for unloading?

A. Yes, sir; set.

Q. And, on the other hand, if a drag was made up on the south side of the river, the cars were picked up from the different switch yards in the same way and taken to the north side of the river into the switch yard, and there distributed into the trains for which they might be intended?

A. I would say that would be the method in which they would be handled."

The foregoing is in substance all of the testimony introduced by the Government relating to the three counts now before this court.

The testimony on behalf of the defendants as to these three counts is substantially as follows:

John Deere testified (Record, 49), that he was a switch foreman, and had charge of the different drags of cars that were being switched back and forth across the river referred to by the Government; that as switch foreman his duties were such as breaking up trains and trensfers and shifting them from one track to another, and making up trains in the switch yards, or dismembering trains in switch yards (Record, 49).

On cross examination, this witness testified that the switching crew would sometimes take the waybills over to Murry Yards where the trains were made up

to go out on the road (Record, 52), and further (Record, 52):

> "Q. And if there is no large number of these cars fitted up, having their air brakes used and operated, if it becomes necessary to stop those cars quickly, it is necessary for the switching crew to go to the top of the cars and operate the hand brakes, isn't it?
> A. *No, sir.*"

That in the course of his duties as switch foreman he sometimes took these switch drags or strings of cars from what is known as the 12th Street Yards to the Murry Yards; that the distance between the two yards was about a mile and a half or three-quarters; that the "bridge and all" were within the yard limits (Record, 52); that the track across the bridge is a single track about 3,000 feet long, and is also used by trains of other railroads (Record, 53).

On re-direct examination this witness testified that the term "switch drag" is a term known among railroad men, and generally applied to the strings of cars referred to in the testimony; that they were called switch drags or Murry drags, or cuts or transfers of cars (Record, 54).

F. C. Rice, general inspector of transportation for the Burlington system, testified (Record, 59) that he has been connected with that railroad 49 years; that he is connected with the American Railway Association, which is an association composed of every interstate railroad in the United States, of which there were 447;

that he has been connected with said association about 20 years as a representative of the Burlington; that the representatives of the various railroads constitute the association (Record, 59); that the witness commenced with the Burlington Railroad in 1863 as a telegraph operator and clerk, and thereafter became an agent, train dispatcher, division operator, chief train dispatcher, train master, division superintendent of the Illinois lines, and finally general superintendent (Record, 60); and further (Record, 60-61):

> "Q. Now, from your knowledge of the railroad business, and especially the transportation part of the railroad business, do you know whether or not the word 'train' as used in the railroad business has any fixed, definite and technical meaning among railroad men, and in the railroad business, and especially the transportation business?
> A. It has.
> * * * * * *
> Q. You say that the word 'train' in railroad parlance, has a fixed, definite and technical meaning?
> A. Yes, it has.
> Q. What is the meaning of the word 'train' in railroad parlance, as applied to the railroad business?
> A. A train is an engine, or more than one engine, coupled together with or without cars displaying markers.
> Q. For how many years has that been the technical meaning of the word 'train' in the railroad business, so far as you know?
> A. It has been over fifteen years. I am not sure but it is twenty, I think twenty years.
> Q. At least twenty years?
> A. Yes, the established definition.

Q. Is that a definition given to that word by the American Railway Association?
A. It is.
Q. And that has been a definite meaning given to it by the American Railway Association for at least twenty years?
A. Yes, sir.

Mr. Timmonds: If Your Honor please, I don't know whether you are aware of it, but I call your attention now to the fact that in the safety appliance act Congress recognizes the validity and existence of the American Railway Association, and clothes it with certain powers; names it specially in the act, in the safety-appliance act."

The witness testified further, as follows (Record 62-63-64):

"Q. Will you tell the jury what the word 'markers' in the defining of a railroad train means, if you know?
A. It is a special signal placed at the rear end of the train to indicate that the train is intact, that it is complete—color signals by night and flags by day, colored flag by day.
Q. Those markers are at the front and rear end of the trains, too?
A. No, sir; a marker is only at the rear end.
Q. What do those markers indicate and mean?
A. They mean the train is full and complete; that is, the end of the train.
Q. When a train is full and complete, as you have said; is it then in condition to be moved out on the lines of the railroads—it may go on the roads, then; run to its destinations?
A. There are certain things required at the head end of the train.
Q. What is that?

A. A head light on the engine, and if it is an extra train—there are only two classes of trains; one is a regular train, which is a train that is on the time table and has a schedule; that is one class; and the only other class is an extra train, and an extra train and a regular train both carry markers, but an extra train carries two distinct signals on the front end of the train to designate it is an extra, which a regular train does not carry.

Q. The markers are on an extra, as distinguished from a regular train?

A. No, not at all. The marked of an extra and a regular passenger or freight is the same. A regular train carries nothing in front but a head light, unless run as a section, and an extra train is obliged to carry two white lights by night and two white flags by day to show it is an extra as distinguished from a regular; so, to be complete as a train, it must have those signals.

Q. Strings and drags that move around in the switch yards in charge of the switch crews, with switch engine, do not have any of those things on them?

* * * * * *

A. At night the switch engine would have a head light.

Q. And the markers referred to?

A. The switch engine, under our rules, does not carry markers. They are prohibited from carrying markers. The switch engine is prohibited from carrying markers.

Q. Under the rules of the American Railway Association?

A. Yes, sir.

Q. These rules have been in force for at least twenty years?

A. Twenty-nine years.

Q. Has that definition of the word 'train' always

been in force by the American Railway Association for twenty-nine years or longer?
A. I don't think that definition of a train—the definition of a train was made while I was a member of the train-rules committee of the American Railway Association.
Q. Twenty years ago?
A. During that time. I don't remember just when we made that, but it was eighteen or twenty years ago.
Q. *Now, then, I will ask you whether or not trains, within the meaning of railroad parlance, perform different functions from these switch drags—do they run out on the road and make long runs from point to point—switch drags do not do that?*
A. No, sir.
Q. What are switch drags for; what function or duty or work do they do in the railroad business?
A. In the yards, in the yards proper, where we have storing tracks and have classification tracks, the switch engines sort the cars.
Q. Sort them?
A. Sort and put the cars of a kind together; that is switching; and when necessary, after the classification of cars has been made, to go to some other yard or to some other point, we call it a transfer.
Q. A transfer?
A. A transfer; that is the general name that is used—transfer or string.
Q. Transfer or string?
A. Yes.
Q. Then it is the work of this transfer or drag—switch drag, as you call it—it is either to assemble or take and get together cars coming in from different trains or get them together and take them where they can be put into their trains?
A. Supposing you have trains come into our yard across the river, and they may have cars for a

dozen different destinations—might have four or five trains that might come in and have cars for elevators, if you have elevators, and the switch engine would separate them.

Q. Trains come in, and they stop in the yards at Murry?

A. Yes.

Q. *And they are broke up?*

A. *They cease; the train ceases in the Murry yard.*

Q. *Ceases to be a train?*

A. *Ceases to be a train.*"

Joe McDonald, assistant superintendent of the defendant railway company at Kansas City, testified (Record 64) that he had been in the railroad business thirty years, beginning as a yard clerk, and thereafter becoming a switchman, assistant yardmaster, conductor, yardmaster, assistant yardmaster, general yardmaster, trainmaster and superintendent; that the length of the single track across the bridge and connecting the 12th Street Yard and Murry Yard is 3,000 feet (Record, 65), and further (Record, 65-66):

"Q. Is there any other way whereby the two ends of these switch yards may be used, except by getting across the river on that track?

A. There is not.

Q. Now, do you know where the switch yard limits are?

A. Yes, sir.

Q. Tell the jury.

A. *The north yard limit is at the switches, just north of the switches, and at the extreme north end of what is known as the Murry Yard, the south limits of them is about Twenty-seventh and State Line Streets.*

Q. *On the south side of the river?*
A. *Yes, sir; south of Twelfth Street.*
Q. *Are these two ends now, and have they all along been, used together as constituting one switch yard in the management of the railroad business of the Chicago, Burlington & Quincy Railroad?*
A. Yes, it is all one yard.
Q. How long has it been so?
A. It has been so ever since it has been a yard, ever since the yard was completed.
Q. How long has that been?
A. The Murry Yard was added onto it, I think, about seven or eight years ago—about ten years ago, possibly, I don't remember the exact date.
Q. *During all that ten years the two ends of it, and with the bridge between them, over the Missouri River, and between them, have been used as constituting one switch yard, in the management and handling of the railroad company's business here at Kansas City?*
A. Yes, sir.
Q. And then this one track that crosses the bridge, that is the track referred to by the Government witnesses was it, the one you are referring to as being 3,000 feet long—that is the track they have been referring to?
A. I should judge so; yes, sir.
Q. *And that* 1,000 *foot track which crosses the bridge is the only track, and is all within the switch limits?*
A. *Yes, all in the yard limits, sure."*

With reference to the meaning of the word "train" as understood by railroad men, the witness testified as follows (Record, 66-67-68-69):

"Q. Do you know, from your experience as a railroad man, whether the word 'train' has any

fixed, definite and technical meaning, as applied to the railroad business?

A. Yes, sir.

Q. In railroad parlance, what is the meaning or definition of the word 'train'?

* * * * * *

A. A train is one or more engines coupled together, with or without cars, with markers, markers displayed.

Q. A train, then, being, as you define it, is a complete connection of cars, with a road engine and train crew for use in running on the railroad from destination to destination?

* * * * * *

Q. It is then in condition to be run on the road, in the railroad business?

* * * * * *

A. *Yes, it is a train after the engine is on and way car put on, and the markers are displayed, and furnished with a train crew.*

Q. And it is not a train until then?

A. No, sir.

Q. *Now, you heard about these strings or drags of cars referred to, which are being hauled back and forth across the bridge here from one end of the yard to the other in the making up of trains and breaking up of trains—what, in railroad parlance, is the name of that string of cars?*

A. *A string of cars going from the Twelfth Street yard to the Murry yard would be called a drag, for the reason they would go over there to be part of them sent out on trains and part of them to the elevators or the other industries or store tracks to be held; what we know as a drag of cars, a string of cars going from the yard in Kansas City, going to the Santa Fe, the Missouri Pacific, or the C. & A. would be known as a transfer, a delivery to the connecting line, a transfer to be delivered.*

Q. Do they carry markers?
A. Oh, no.
Q. Do they ever carry markers in the railroad business, what you call markers on a train; drags do not carry markers?
A. No; only on trains, but not on transfers or drags.
Q. Are they ever entered upon the time tables, scheduled like trains are?
A. No, sir.
Q. *Can you, in some general way, without taking up too much time, explain to the jury how drags, transfers, are handled in the switch yards? Take a drag going from the south side of the river to the north side, and tell how the drag is made up and handled.*
A. *We receive from some ten or twelve different roads at Kansas City cars from different places, from the east, north and northwest, and those cars will be assembled and go into a drag, taken over to Murry's—it might be elevator loads, or loads for the construction company, any of those people over there; they go over in one drag, over to Murry's, and are sorted over there in the classification yard.*
Q. To be put into trains, if the trains go?
A. If they are train cars. Possibly there might be a few train cars and a few for other places. They are taken over there and classified and put in different places, but eventually delivered or sent out in trains, whichever the case might be, where the car goes.
Q. That is in charge of what is known as the switch crew with a switch engine?
A. Yes, sir.
Q. And the foreman?
A. *That never gets out on what is called the main line; it is always within the yard limits.*

Q. When they come the other way, from the north side of the river to the south side of the river, you say they are called transfers, properly?
A. Yes, sir.
Q. Explain to the jury the movements in that case, how made up, what for?
A. The trains that come from the north and west and from the east, if they pull in the Murry yard, they stop there, and the switching crews would take charge of them.
Q. Do they cease to be trains when they come in the Murry yard?
A. Yes, sir.
Q. And turned over to the switching crew?
A. Yes, sir.
Q. What does the switching crew do with them?
A. Classifies the stuff---switches it up to the different connecting lines it goes to.
Q. Break up the trains and take the cars out and classify them?
A. Yes, sir.
Q. What do they do with them?
A. They deliver them; all the cars that go to the Santa Fe to one track, and the cars of the Missouri Pacific to another, and the Union Pacific another, and so on, and then they are doubled up into transfers, and one engine, taking probably thirty or thirty-five cars, goes to Kansas City to deliver them to the different connections.
Q. Distributes them over here?

The Court: Were these drags or transfers, whatever you call them, in controversy here of the kind and description you are now describing?

The Witness: Yes.

Q. These drags or transfers in controversy, they did not display any markers?
A. Oh, no.
Q. Do they ever display markers—any cars used in that manner?

A. We do not furnish the markers to the switch crews at all.
Q. And they never have any?
A. No, sir.
Q. And never display any?
A. No, sir.
Q. And they are never entered upon the schedules, the railroad schedules?
A. No; no schedule.
Q. They could not be handled in that manner?
A. I would not like to try to handle them in that manner.
Q. They never are?
A. No, sir.
Q. By any railroad?
A. No; not that I know of around here."

On cross examination, this witness testified that what is known as the 12th Street Yard is a part of he company's yards; that there is some classifying done there, but more is done at what is known as the 25th Street Yards at the south end of the Burlington Yards; that the distance between the 12th Street Yard and Murry Yards is two miles (Record, 69); that to go from the 12th Street Yard to the Murry Yard, the trains had to pass over the single track which is used by passenger and freight trains of other roads, but the witness did not consider this "main line" (Record, 70); and further (Record, 70-71):

"Q. Now, these trains that were made up in one yard to go to another—whether you call them trains or drags or transfers---they are not run on regular time-tables?
A. No, sir.

Q. They have no proper schedule time?
A. No, sir.
Q. They are made up, as the case may be, and take their chance on getting by, do they?
A. Yes, sir.
Q. They have to keep out of the way of express and through trains, don't they?
A. They run right along ahead of them, or behind them.
Q. They are operated under some kind of orders, are they not?
A. Operated under a block system.
Q. And they proceed when it is supposed that an express train is not coming?
A. They proceed whenever they get the block.
Q. And those blocks are governed by signals that come from the dispatcher's office?
A. *No; there is no train dispatcher there.*
Q. By orders that come from where?
A. *From the towermen that work the switches.*
Q. *Where do the towermen get orders as to when trains are coming?*
A. *From one another. They let one train follow another right along.*
Q. *And the express trains lose their time schedule, do they, when they arrive within the limits there, and have to wait upon the convenience of any of these other trains hat happen to be let into the block by the towermen?*
A. *Yes, sir; you bet that is true; they have to wait."*

The witness further testified, on cross examination, as follows (Record, 72):

"Q. After the switching is done and a drag of cars is made up at one of these yards, it then is run as a unit over the main line to the other yard, where it is then separated: that is the truth, isn't it?

A. It is run as a unit through the yard to the delivering point.
Q. Over these two miles of track?
A. Yes, sir.
Q. Single track?
A. Yard track; yes, sir.
Q. If that two miles of track is not main track, then there is not any main track, is there?
A. Oh, yes; lots of it.
Q. Between Murry Yard and the Twelfth Street Yard?
A. No; there is no main track.
Q. There is no main track?
A. No.
Q. And you say that the tracks used by all those railroads for passenger trains and freight trains are not main line?
A. No, sir; yard track; governed under yard rules; moved about over there under yard rules."

The witness further stated on cross examination that the tracks between the 12th Street and Murry Yards passed through the Union depot tracks and across the tracks of other railroads (Record, 72-73); that the first freight yard after leaving the 12th Street Yard is the Murry Yard where there are 17 or 18 tracks in the classification yard, six in the reception yard, six or seven in the departure yard, and eight or nine in the grain yard and four or five in the repair yard; that the Murry Yard is about a mile and a half or two miles long, and about a quarter of a mile wide; that the 12th Street Yard runs from 12th Sreet to 29th Street, a distance of about fourteen or fifteen blocks, and is about two hundred feet wide (Record, 73); that there are 16 or 17

tracks in the 12th Street Yard; that the tracks are open at both ends; that there are also "hold" tracks there; that some classification is done there as well as in the Murry Yards (Record, 74); that the distance between the 12th Street Yards and the bridge across the Missouri River is about twelve blocks (Record, 74).

F. H. Ustick testified (Record, 75) on behalf of defendant that he had been in the railroad business thirty-three years, and was general superintendent of the Burlington's Missouri lines, and with reference to the meaning of the word "train" testified, as follows (Record, 75-76):

> "Q. I wish you would state to the jury whether or not the word 'train' has, and has had for the last twenty years or more, in the railroad business, and amongst railroad men handling railroad business, any fixed, definite, and technical meaning as applied to that business.
> A. Yes, sir.
> Q. Tell the jury what that meaning is.
> A. One or more engines coupled together, with or without cars, displaying markers, constitutes a train.
> Q. And that is the meaning, in railroad parlance, of the word 'train,' and has been all these twenty years or more?
> A. Yes, sir.
> Q. What is a drag, or transfer, in railroad parlance, if there is any such word?
> A. A drag is considered a yard movement of cars, being shifted from one yard to the other, through the leads, and a transfer is a delivery that ---a string of cars rather that is being delivered to connecting lines.

Q. Those movements of cars are all in switching of the cars?

* * * * * *

A. Yes, sir.

Q. You have been present today and heard the description of these strings of cars that cross the bridge here across the Missouri River between the north and south ends of the switch yards of the Burlington Railroad Company?

A. Yes, sir.

Q. In what respect, if any, do they differ from a train in railroad parlance?

A. They are all different, because yard movements of cars are handled by men who shove the cars, and who are known as yardmen or switchmen, who do not have to pass an examination for train service, while the train on the road, the conductors and enginemen are required to pass an examination on all rules and time tables before they are permitted to take charge of train work.

Q. You gave the definition of a train; in what respect do these strings of cars we have been talking about here today differ from a train in railroad parlance?

* * * * * *

A. In what respect do they differ?

Q. Yes; either in function or make-up.

A. The yard train is a train that is being broke up, switched, or delivered to connections, while a train is a movement of them from one terminal to another.

Q. Do these drags or transfers ever display markers in the railroad business?

A. No, sir.

Q. Do they have places on the schedules of the railroads?

A. No, sir.

Q. Trains are always scheduled, are they?

A. Yes, sir."

The witness, Joe McDonald, upon being recalled, testified further that the drags or strings of cars in question did not get their signals from the train dispatcher; that the train dispatcher handles the trains over the main line, from one terminal to another; that the trains from one terminal to another are run on a schedule, except in the case of an extra when they would get their orders from the train dispatcher; that the switching crew in operating the drags would not get any instructions from the train dispatcher, but that their movements over the bridge are controlled by what is known as a towerman, who has charge of the interlocking levers of the switches, and that the signals are given by the towerman to the switch foreman when the track is clear so that they can pass from one yard track to another (Record, *77*).

Summary of Evidence.

The foregoing evidence of all of the witnesses, and the natural and logical conclusions to be deduced therefrom may be summarized as follows:

Respondent's Kansas City Terminal Yards:

The general terminal yards of the respondent company at and near Kansas City, Missouri, are made up of groups of yard tracks, used as receiving, classifying, assembling, delivering and storage tracks. These groups of yards tracks *together with the tracks passing*

between and connecting them make up the general terminal yards and are all within the terminal yard limits. The group or system of yard tracks at the extreme south end of the general terminal yards is known as the "Twenty-fifth Street Yards," presumably because of its proximity to Twenty-fifth Street in Kansas City, Missouri. The group or system of yard tracks located at about the center of the terminal yards is near Twelfth Street, and is referred to as the "Twelfth Street Yards." The group or system of yard tracks at the extreme northerly end of the terminal yards is referred to as Murry Yards. The Missouri River passes between the group of yard tracks known as the Twelfth Street Yards, and the northerly group or system of yard tracks known as Murry Yards, and the two groups of tracks are connected by a single track passing over the bridge crossing the river, and the approach thereto, which track is 3000 feet in length.

Prior to the addition of what is known as Murry Yards, about ten years ago, the Burlington's terminals at Kansas City consisted of yard tracks extending from the Missouri River to about Twenty-fifth Street, and from Twelfth street south to Twenty-fifth Street, there were systems or groups of yard tracks used for assembling and breaking up trains, for the classification of cars, for team tracks and for the distribution of cars to various industries. It is reasonable to infer from the evidence that that part of the terminals known as Murry Yards was added because of

the necessity for an increased number of yard tracks; that in order to enlarge the terminals it became necessary to acquire land north of the Missouri River, and that thereafter the terminals included the tracks on the north side of the river and the single track passing across the bridge and connecting the groups of yard tracks on the north and south side of the river. The various yard tracks grouped together at and near 12th Street, and at and near 25th Street, and in Murry Yards were and are all operated as a single terminal yard, and were and are all within the yard limits of the railroad company, and were all in charge of the yardmaster. Freight trains coming in off the line from points north, northwest and east of Kansas City have their terminus in Murry yards, and all trains coming into any part of these terminals, lose their schedule upon arriving in the yards, and are thereafter moved under yard rules. All movements of cars between the various systems or groups of yard tracks, in the course of switching operations that are necessarily carried on in the making up and breaking up of trains and in the distributing of cars are in charge of a switch foreman and switching crews, and are not in charge of trainmen or train crews.

It appears from the testimony that the single track across the bridge was used by passenger and freight trains of other roads, and the Government's witnesses referred to this track as "main line" but this was the mere statement of their conclusion, and it appears beyond question that this single track was all within the yard

limits, and formed a part of the terminals; that it was no more a part of the main line than any track that is used by trains coming in off the main line and passing through yard terminals. The fact that trains of other railroads passed over the Bridge across the Missouri River does not make the single track on the bridge a part of the main line. The court will perhaps take judicial knowledge of the fact that by reason of the topography of the country it is exceedingly difficult for railroads to gain access to the city from the north, and for that reason the trains of a number of railroads are permitted to pass through the Burlington's Terminal Yards, in order to reach the Union Depot, but in so passing through said terminals they become subject to yard rules, and are no longer subject to schedule as is the case when they are out on the main line.

The Character of the Movements Involved.

In the course of the breaking up and making up of trains and the distribution of cars to industries, it was necessary from time to time to move a group or string of cars from one group of tracks to another, and these movements were always in charge of switching crews, and were made exclusively under yard rules and regulations. None of such transfers or movements of strings of cars were made under any schedule, but they were moved from time to time as occasion demanded and other yard movements permitted, and were moved at slow speed, one right after the other as close as

they could be moved, starting and stopping irregularly whenever other movements in the yards required it; that such movements were not made at a rapid or high rate of speed as trains are moved out on the road; that in making such transfers the switching crew did not have to operate or use hand brakes, and that such trains were not made up with markers or caboose as is the case with trains made up to go out on the road.

All of the movements in question involved in this proceeding were switching movements which were being made for the purpose of distributing cars to various trains which were being made up, to various industries and to various other railroads.

No evidence was adduced on the part of the Government to show that any of the switching crews operating these transfers of cars, or any other employes were subjected to any danger or risk by reason of the conditions surrounding the making of the movements in question, and neither is there any evidence that any passenger or passenger train were subjected to any danger, or that any accident had ever occurred by reason thereof. The evidence shows clearly and conclusively that the conditions under which these transfers of cars were moved were and are entirely different from those under which *trains* are operated out on the road where they attain a high rate of speed, which must be reduced and increased rapidly in order to transport commerce expeditiously and accomplish the schedule under which they are operated.

None of the movements referred to in evidence come within the definition and meaning of the word "train" as understood, adopted and applied by railroad men in the railroad business.

Distinctions between regular trains and transfers or drags of cars:

The differences between regular trains moving out on the road and transfers or "strings" or "drags" of cars moving between groups of tracks within a terminal yard, as shown by the evidence, are numerous. Some of the differences are, as follows:

1. Transfers of cars moving between groups of yard tracks in a terminal yard carry no caboose or markers, while regular or road trains carry both a caboose and markers.

2. Transfers of cars moving between groups of yard tracks in a terminal yard are operated by switchmen while road trains are operated by road crews, that is, a conductor, brakeman, engineer, fireman, etc.

3. Transfers of cars moving between groups of yard tracks in a terminal yard are not operated under schedule, but are moved whenever they are assembled, and other yard movements will permit, whereas road trains are operated under schedules.

4. Transfers of cars moving between groups of yard tracks in a terminal yard are operated entirely within the yard limits, and do not go out on the main line, whereas road trains are operated from terminal to terminal over the main line.

5. Transfers of cars moving between groups of yard tracks in a terminal are operated at slow speed under control, starting and stopping whenever conditions in the switch yards demand, whereas road trains are operated at a high rate of speed, stopping only at scheduled stations and crossings.

6. The movement of transfers of cars between groups of yard tracks in a terminal is merely one form of switching, and is merely incidental to the main business of the carrier in carrying commerce from station to station, whereas road trains are engaged in performing the chief function of the carrier—the transportation of commerce from station to station, and from state to state.

7. The definition of the word "train" as understood by railroad men, and adopted by the American Railway Association, to-wit: "Train—An engine or more than one engine coupled with or without cars, displaying markers," does not include transfers of cars moving between yard tracks within a single terminal.

8. The conditions under which transfer of cars move between groups of yard tracks in a terminal yard, differ in different terminals, and no hard and fast rule governing such movements can be adopted as in the case of movements of road trains, and the rules and regulations under which such movements should be made must necessarily be left to the judgment and wisdom of the persons in charge of the various terminals where such movements are made.

ARGUMENT.

The sections of the Safety Appliance Act as amended, which are alleged to have been violated by the movements referred to in the second, third and fourth counts of the complaint, are Section 1 of the Original Act, as amended in 1896, 29 Stat. at Large, 85; 3 U. S. Comp. Stat. 1901, page 3174, and Section 2 of the Amendment of 1903, 32 Stat. at Large, 943; U. S. Comp. Stat. 1901, Supplement 1911, p. 1315.

Section 1 of the original acts, as amended, is as follows (italics are ours):

> "Be it enacted, etc., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use *on its line any locomotive* engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to *run any train* in such traffic after said date that has not sufficient number of cars in it so equipped with power or train brakes that the engineer on the *locomotive* drawing such *train* can control its *speed* without requiring *brakemen* to use the common hand brake for that purpose."

Section 2 of the Amendment of 1903, is as follows (italics are ours):

> "That whenever, as provided in said Act, *any train* is operated with power or train brakes, not

> less than fifty per centum of the cars *in such train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train;* and all power-braked cars in such *train* which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any *train* required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirements of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

The order of the Interstate Commerce Commission made November 15, 1905, in pursuance of the provisions of the foregoing section, is as follows (italics are ours):

> "It is ordered: That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any *train* is operated with power or train brakes, not less than 75 per centum of the cars in such *train* shall have their brakes used and operated by the engineer of the *locomotive drawing such train,* and all power braked cars in every such *train* which are associated together with the said 75 per centum shall have their brakes so used and operated."

It will be observed that the foregoing provisions of the Act relate to *trains* and not to *cars,* that is, they provide for the use and operation of airbrakes on *trains* under certain circumstances. The other provisions of

the Act not hereinabove set forth, relate to *cars*, and not to *trains*, that is, they require that *cars* shall be equipped with certain appliances. By the terms of the Act, a marked distinction is made and intended to be made between the requirements relating to the use and operation of airbrakes on *trains*, and the requirements relating to the equipment of *cars* with certain appliances. The Act makes the *train* the unit in requiring the use and operation of air brakes, and makes the *car* the unit in requiring certain appliances, such as coupling devices, grab irons, etc., to be provided.

The judgment of the Circuit Court of Appeals on the three counts brought here for review, relates solely to the air-brake provisions of the Act, and therefore relates to *trains* as a unit, and not to *cars* as a unit.

Furthermore, the Act applies only to the *running* of trains.

In the interpretation and application of the air brake provisions of the Act, these questions necessarily arise at the outset:

What is a *train*, within the meaning of the Act? and

Under what circumstances does the movement of engines and cars on a railroad track constitute the *running* of a train within the meaning of the Act?

It appears from the evidence in this case that there are two entirely separate and distinct classes of movements of engines and cars on railroad tracks, to-wit:

First. Movements where engines and cars are coupled and made up in the form of a *train* with markers and are *run on the main line* at a high rate of speed from station to station, as a single unit, under schedules, under the control of train dispatchers and in charge of road crews for the purpose of accomplishing the main function of the carrier—that is, the transportation of commerce from station to station and from state to state.

Second. Irregular movements of engines and cars within a terminal yard for the purpose of assembling and breaking up trains, classifying and receiving cars from and delivering them to the industries which are being served by the carrier, these latter movements being merely incidental to the transportation of commerce from station to station and state to state, and being made at slow speed at irregular intervals from time to time without schedule, as the switching crews which control them find it necessary to make such movements, and passing from one yard track to another, backwards and forwards as conditions require, being governed only by yard rules and not being made up in any particular manner, but merely performing work preliminary or supplementary to the principal movements of trains out on the line.

The former class of movements are frequently described and referred to as "main line movements," or "movements out on the road." The latter class of movements are usually described and referred to as "switching operations," or "switching movements."

It is conceded that the air-brake provisions of the Act relate to the former class of movements, and the questions in this case arise in connection with the latter class.

Increase in railroad traffic has necessarily increased the size of terminal yards, which are made up of assembling tracks, receiving tracks, classification tracks, delivering tracks, team tracks, storage tracks and tracks for other similar purposes. As terminal yards have grown, the number of cars that have to be transferred from one group or system of yard tracks to another has increased, and the distance between groups or systems of yard tracks in one terminal yard has been extended. The result is that in recent years some of the switching operations necessarily carried on in a terminal have become more extensive than in former years.

It does not appear from the evidence that there is any clear line of demarcation between what may be termed "ordinary switching operations" taking place within a group of yard tracks, and switching operations which consist of the transfer of a "drag" or "string" of cars from one group of yard tracks to another within the same terminal yards. In the latter class of switching operations, the cars are necessarily picked up one at a time and then transferred in a string to another group or system of yard tracks, where they are then classified and distributed a few at a time to different trains or to various industries.

The Government apparently is seeking to create a distinction and to fix a line of demarcation between ordinary switching operations which take place entirely within one system or group of tracks, and more extended switching operations which consist of picking up cars one at a time at various points within a group of yard tracks, and then transferring them to another group of yard tracks in the same terminal yards and distributing them one at a time at various points in the latter group of yard tracks.

It is by no means clear from the evidence in this case that there can be any distinct line of demarcation between the two kinds of switching operations referred to. They necessarily merge one into the other, and are more or less distinct, depending upon the conditions in the general terminal yards where they are made, the size of the yards, the distance from one group of yard tracks to another, and the topography of the country where the terminal yards are situated.

However, for the purpose of this discussion, movements within a single group, or system of tracks, will be referred to as "ordinary switching operations," and movements from one group or system of tracks to another within the same terminal yards or system, as "movements of transfers of cars," or "extended switching movements."

It is conceded by the Government that the air-brake provisions of the Safety Appliance Act do not apply to "ordinary switching movements." On page 13 of its brief the Government says (our italics):

> "The Government agrees that 'it is not a wrangle over mere names' and *maintains that the question whether or not a bona fide switching movement falls within the act is not present in this case,* but that the question presented is—Do the movements, by whatever name described, of said transfer trains, expose their trainmen, the public, and interstate commerce, to the dangers from which Congress sought and intended to exclude them?"

In the case of *Erie R. Co.* v. *United States,* 197 Fed. Rep. l. c. 288, in which the same question was involved, Judge Buffington, in his opinion, states and says as follows:

> "It is conceded by the government that this act does not apply to, or at least has never been enforced as to switching operations. Manifestly such is the reasonable construction of the act."

The Government in its brief filed in the case of *Atchison, Topeka & Santa Fe Railroad Co.* v. *U. S.,* 198 Fed. Rep. 637, said as follows (italics ours):

> "Such movements as are disclosed in the evidence as to these counts cannot properly or fairly be designated as yard movements. There were yard movements before the train reached Corwith. There were yard movements when the cars were distributed at the 18th Street Yard. *As to such yard movements strictly so called, it might not be practical to require the coupling up of the air."*

Since the Government thus concedes that the air-brake provisions of the Safety Appliance Act do not apply to what are termed "ordinary switching movements," and that the question as to the application of such provisions

to "ordinary switching movements" is not involved in this case, the only question with which we are concerned is whether the air-brake provisions of this Act can be applied to more extended switching movements consisting of transfers of cars from one group or system of tracks to another group or system of tracks, all within one terminal yard. Assuming, therefore, that the air brake provisions of the Act do not apply, and concededly cannot be applied to "ordinary switching movements," we will not discuss the application of such provisions to those movements, except insofar as such discussion may throw light upon the question whether the air brake provision can or should be applied to more extended switching movements.

Just why the air brake provisions of the Act should be applied to one form of switching operations, when they concededly do not and cannot be applied to another form of such operations is not made clear by the Government in its brief, and nowhere does it call attention to any terms or provisions in the Act which specifically include the more extended switching movements consisting of transfer of strings of cars from one point to another within a terminal yard, and neither do we find any clear, logical statement of any rule of interpretation whereby the terms of the act can properly be construed to include such movements. Apparently, the Government is arbitrarily asking the court to construe the air brake provisions of the Safety Appliance Act so as to include extended switching movements, although there is nothing in

the act to warrant such construction. This is nothing more nor less than asking the court to usurp the functions of Congress.

As a matter of fact, there is scarcely a rule of construction known to the law, which, when applied to the facts of this case, does not clearly and unequivocally *exclude* all switching operations, both ordinary and extended, from the air brake provisions of the Safety Appliance Act.

A consideration of the terms of the Safety Appliance Act itself and of some of the familiar rules for the construction and interpretation of statutes as applied to the facts of this case, and of the decisions relating to the air brake provisions of the Act, leads irresistibly to the following conclusions:

1. The transfers of cars referred to in the evivdence do not come within the specific terms and provisions of the air brake provisions of the Safety Appliance Act, nor do they come within the language and terms of the Act as a whole.

2. The general purpose, scope and object of the Safety Appliance Act necessarily excludes the application of the air brake provisions to extended switching movements of the kind in controversy.

3. The application of the provisions relating to the use and operation of power brakes to switching movements would lead to absurd, ridiculous and oppressive results, and it is apparent from the Act as a whole that this was not intended.

4. The Act has not been construed by those entrusted with the enforcement thereof, so as to include switching operations.

5. The decisions of appellate courts relating to the application of the air brake provisions of the act to switching operations are contrary to the contentions of the Government.

These will be discussed in the order named.

I.

The transfers of cars referred to in the evidence do not come within the specific terms and provisions of the air brake provisions of the Safety Appliance Act, nor do they come within the language and terms of the Act as a whole.

It is perfectly obvious from the verbiage of the statute itself that Congress never intended that the Act should apply to switching movements. The terms of the Act are not such as to evidence such an intent, but rather indicate directly the contrary as clearly as could be indicated without a specific exception of switching movements. The Act forbids the railroad

> "to use *on its line* (not in its switch yards or terminals) any *locomotive* engine (not switch engine) in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to *run any train* (not *switch* any drag or transfer of cars) in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or

> train brakes that the engineer on the *locomotive* (not *switch* engine) drawing such *train* (not drag or transfer of cars) can control its *speed* without requiring *brakemen* (not switchmen) to use the common hand brake for that purpose."

The Act could not have been drawn so as to be more consistent with the idea that it was intended to exclude *switching movements* so far as the operation of train brakes is concerned. Among railroad men and the public generally, the railroad's *line*, is not understood to mean the *switch yards*. The railroad's *line* is its *main* track extending from station to station. The word "train" as understood by railroad men, certainly does not include movements in switch yards. Railroad men and the public generally know that *brakemen* have to do only with trains *out on the road* and not with movements in switch yards. Movements in switch yards are handled by *switchmen* only. The purpose to be accomplished is the *control* of the *speed* of *trains*. High rates of *speed* are attained out on the *main line*, not in switch yards and terminals. It thus appears from the terms used in the Act itself that it was not intended to apply to movements in switch yards so far as the operation of train brakes is concerned.

This argument cannot be better stated than in the language of Judge Buffington in the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, where he says (italics are ours):

> "Indeed, a careful study of this act shows the use in the statute of terms and words which in com-

mon use are applied to *road,* as contrasted with *switching,* operations. The act deals first with the locomotive alone as distinguished from the train. It makes it unlawful for the railroad 'to use on its line'—and line, main line, is a word which, in the common speech of railroad work, distinguishes the *line of the road* from *switches* and *terminal yards.* But the act proceeds, 'to use on its line any locomotive engine in moving interstate traffic.' Surely the words, 'in moving interstate traffic,' in connection with the use of a locomotive on its line, is aptly applied to draft of trains in their transit between states. But the act proceeds, the locomotive *'on its line'* which is 'moving interstate traffic' must be equipped with 'appliances for operating the train-brake system, mean that the system, the train-brake system, operated by the locomotive *'on its line"* and in 'moving interstate traffic,' refers to a *running,* rather than a *switching,* movement And the further words of the statute, which make it unlawful for the road 'to run any such train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring *brakemen* to use the common hand brake for that purpose,' are words that aptly describe train movement. The operation of 'the *locomotive drawing such train*' is in marked contrast with the push and pull of a *switching* engine, and 'control its speed,' refers to a *train* that is speeding, for the appliances must be such that 'the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.' All these terms and words of railroad parlance are applicable to line travel and fitly descriptive thereof. In railroading, *'line'* is contrasted with *'switch,' 'yard,'* and *'terminal;'* main

line, branch line, with switches. A 'locomotive drawing such train' is in contrast with the push and pull of a yard switching engine."

Manifestly the logic of this argument applies alike to *ordinary switching movements* within a single system of yard tracks, and to more extended *switching movements* consisting of transfers of cars from one yard track to another.

Furthermore it appears from the Act as a whole, and the purpose and object to be accomplished thereby, that the word "train" is used in its technical sense as understood by railroad men; and the word "train" as used in its technical sense, does not include transfers of cars of the kind referred to in the evidence herein.

While the general rule is that in the interpretation of a statute, words will be given their usual and ordinary meaning, yet when it appears that the words in the statute *have* a technical meaning; and that such statute applies to a particular trade or profession, that the statute *directly affects that trade or profession*, and that the *members* of that trade or profession will have to give the statute practical application, then the statute is construed in such a manner as to give those words their technical meaning.

It has repeatedly been held, in the interpretation of the tariff acts, that the words used in those acts, which have acquired a technical meaning in the *commercial* world will be given that meaning, because it will be presumed that Congress intended words to have the mean-

ing which they are ordinarily given by the trade or profession which is directly affected by the statute, and which must give it practical application.

U. S. v. 112 *Casks of Sugar,* 8 Pet. 277
Curtis v. *Martin,* 3 How. 106.
United States v. *Breed,* 1 Sumn. 159, l. c. 163.
Lewis, Sutherland on Statutory Construction, Vol. 2 (Sec. Ed.), Sec. 395 (254), pages 753-754.

See also:

U. S. v. *Patterson,* 150 U. S. 68.
Arthur v. *Morrison,* 96 U. S. 108.
Lawrence v. *Allen,* 7 Howard, 765.
U. S. v. *Weise,* 2 Wall. Jr. (C. C.) 72.
Elliott v. *Swartout,* 10 Peters, 137.
State v. *Murlin,* 137 Mo. 306.
State v. *Railroad,* 219 Mo. 156.

In his work on Statutory Construction above referred to, Sutherland says (italics are ours):

> "Words in common use, and also having a technical sense, will, in acts intended for general operation, and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest. *Such words, however, will be understood in a technical sense when the act treats the subject in relation to which such words are technically employed.* Thus they are deemed technically used in legislation relating to courts and legal process. Thus for example the word 'party' has a technical significance. So have the words 'action,' 'suit' and 'final judgment.' * * *
>
> If a word is technical and used in a technical or conventional sense, it is to be construed according-

> ly, but its interpretation may then involve an inquiry into its technical meaning as a matter of fact. *Such laws are intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage.* Such statutes are to be construed according to the conventional understanding of the terms used."

It appears beyond any shadow of a doubt in the case at bar, that the word "train" has acquired a meaning among railroad men which is peculiar to that profession. In railroad parlance, "a train is one or more engine coupled with or without cars, displaying markers," and is made up *to go out on the road.* No railroad man understands a switch "drag" or a "transfer" or "string" of cars to be a *train.* It is obvious that the Safety Appliance Act must be given practical application *by railroad men,* and that the statute applies directly to *railroad men,* as a profession, and the act is *not* one which directly affects the public generally, or which has to be given application by the public. *The practical application of the act must be made by railroad men,* and under the rules of interpretation adopted by this court, and as a matter of common sense, it must be presumed that the words used in the statute were intended to have the meaning which *railroad men* generally understand them to have.

Not only is the definition of the word "train," hereinabove referred to, one which is recognized by all railroad men, but it is the definition which is authorized, adopted and promulgated under the rules of the American Railway Association. It appears from

Section 5 of the Safety Appliance Act itself that the American Railway Association is authorized by Congress "to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars," and the certificate of that association is made final on that point. Since the entire Act is to be given practical application by railroad men alone, and not by the public generally, and since Congress has recognized the authority of the American Railway Association as an organization which is qualified to pass upon matters of this kind, there is not the slightest room for a reasonable doubt that Congress intended to use the word "train" in the sense in which it is understood by railroad men, who alone have to give the Act practical application.

Under the foregoing definition, "drags" and "cuts" of cars which are pushed and pulled back and forth within a group of yard tracks or which are being switched from one group of tracks to another in the same terminal yards, as in the case at bar, cannot be said to be *trains*, because they do not come within the meaning of the word "train" as used in the Act—they do not display markers, are not made up to go out on the road, and are not operated by road crews, but are merely *switching movements* which are incidental to the assembling and breaking up of "trains," which do go out upon the road and are made up with markers displayed and are in charge of road crews.

It appears that in other cases where the meaning of the word "train" has come before the court for consideration, where the application of the word must be made by railroad men, the court has given the word "train" the meaning understood and applied by railroad men.

Chicago & Eastern Ill. R. R. Co. v. *Maloney*, 77 Ill. App. 191.

Lynch v. *Great Nor. Ry. Co.*, 112 Minn. 382; 128 N. W. 457.

Jones v. *Pierre-Marquette R. R. Co.*, 168 Mich. 1; 133 N. W. 993.

In the case of *Chicago & Eastern Illinois Railroad Company* v. *Maloney, supra*, it appears that a statute of the State of Illinois provided as follows:

> "No railroad corporation shall run or permit to be run upon its tracks, any train of cars, for the transportation of merchandise or other freight, without a good and sufficient brake attached to the rear of hindmost car of the train, and a trusty and skillful brakeman stationed upon said car, unless the brakes are efficiently operated by power applied from the locomotive."

It was held that the evident intent of this statute was to apply to trains running from one place or station to another, *and not to a switching movement of cars in a freight yard.* The appellee's intestate was employed as a laborer in a railroad freight yard in Chicago, and his duty was to clean snow and ice from the switches. While thus engaged, he was struck by the rear end of a train of fourteen cars being pushed by a locomotive. It was the purpose of the crew in charge of

these cars to back the train through the switch wherein Maloney was working, to another part of the yard. In holding that there was no liability on the part of the Company, the court said (italics ours):

> "Under the facts in the case at bar, this statute has no application. *This section is not intended to control the making up of trains in the yard of a railroad company.*
>
> "The making up of a train by a railroad company in its yard at a terminus is not running 'upon its railroad a train of cars for the transportation of merchandise or other freight.' We cannot concede that because the cars being switched in the appellant company's yard were loaded with coal, they were therefore then being used for the 'transportation of merchandise' within the meaning of this statute. *This section of the statute was evidently intended to apply to trains running from one place or station to another. A few cars being switched about in a freight yard are not a 'train' in the sense that word is there used.*"

In the case of *Lynch* v. *Great Northern Railway Company, supra,* the plaintiff was injured while employed as a switchman, and brought suit to recover damages for such injuries. It was contended by the defendant that the plaintiff violated certain rules of the Company. In discussing this phase of the case, the court said, as follows (italics ours):

> "The rules claimed to have been violated are those adopted by the company for the guidance and regulation of the conduct and duties of employes engaged in the freight train service. The rules are published in pamphlet form, and those

claimed to have been violated appear therein under the heading 'Freight Conductors,' one of which makes it the duty of such conductors to know that the cars of their trains have been inspected and that the air brakes are in working order, and to report any neglect on the part of the inspectors to the superintendent. Subdivision (b) of this rule provides that the conductors 'must, with the assistance of their brakemen, make an examination of the brakes, couplings, uncoupling devices,' and other parts of each car in their train, 'so as to know that the same are in good condition,' before starting, and, further, that 'cars picked up at intermediate stations, must be examined carefully.'

"The position of defendant in this connection is that the six cars of logs became in their transit to Sauk Rapids from St. Cloud a 'train,' within the meaning of the rules, and that the switching crew in control thereof were charged with all the duties of inspection there imposed. In our opinion, the evidence made this a question for the jury. The rules upon their face do not apply to yard switchmen or yard service, but, on the contrary, are made specifically applicable to freight conductors and their brakemen, and to the general freight train service. They can be made applicable to switchmen only by construction or analogy.

There is no substantial similarity between the ordinary train service of a railroad company and switching operations in its yard, at least no such similarity as to justify the conclusion as a matter of law that they are the same. The freight train is made up of a road engine, a long string of cars, with caboose, in charge of employes hired for and engaged in the particular department, and charged with duties peculiarly applicable to that branch of the service. Switching crews are engaged in the

work of switching cars about the railroad yards, in the discharge of which the necessity of inspection of instrumentalities, such as the condition of cars moved from place to place, does not apply to the same extent as with respect to a train of cars operated for a considerable distance over the road, where there is no opportunity for examination by inspectors at local points."

In the case of *Jones* v. *Pere Marquette Railroad, supra*, the plaintiff, who was a railroad engineer, was injured in a collision between his engine and a passenger train, and brought suit to recover damages. It was contended by the defendant company that the engineer had violated certain rules, and in discussing the meaning of the word "train" the court adopted the definition as understood by railroad men and contained in the book of rules of the American Railway Association, viz:

> "Train---An engine, or more than one engine coupled, with or without cars; displaying markers."

II.

The general purpose, scope and object of the Act necessarily excludes the application of the air-brake provisions to switching movements of the kind in controversy.

There is absolutely no evidence in this case that any member of the traveling public, or that any employe was or would be endangered by reason of the movements of the transfers of cars in the manner mentioned

in the evidence. As a matter of fact, it is apparent from the evidence that the movements along the single track in question were slow and were made under complete control, so that it was not necessary even for the members of the crew to use hand brakes during such movements.

Since the air brake provisions of the Act do not relate to "ordinary switching operations," and since the extended switching operations referred to in the evidence are merely one form of switching operations, and are not movements out on the road, there is no logic in the Government's contention that the act should now be construed to apply to one form of switching operations because the Government thinks that such extended switching operations might be accompanied with more danger to the traveling public and to employes than ordinary switching movements, although there is no evidence to that effect, but the trend of the evidence is to the contrary.

So far as the employees are concerned, the application of the provisions relating to the use and operation of train brakes to switching operations would not only not *promote* the safety of the employes, but it would render their employment more hazardous and dangerous. It is a matter of common knowledge, which must have been known to Congress, that switching movements require that single cars or groups of cars shall be constantly coupled and uncoupled, in order to classify and reclassify them, to receive them from and deliver them

to connecting carriers, to deliver them to and collect them from team and storage tracks, and in order to assemble and break up trains. These movements within switch yards are slow, and can absolutely be controlled without the necessity of coupling up the full percentage of air brakes required, and the safety of the employes would not be enhanced by the coupling of the such percentage of brakes. On the other hand, if in each one of the many movements made daily in large terminals, the employes were required to couple up the air brakes on practically all cars, as they would if the Act applies, and thus to pass from car to car amidst the dangerous surroundings which necessarily exist, the dangers and hazards which they encounter would be multiplied. Thoughtful consideration of this field of work of railroad employes indicates plainly that the purpose and the scope of the Act could in no way be accomplished by enforcing it in switching operations.

While it appears, in the case at bar, that movements of the character in question are sometimes operated on the same track with passenger trains, which are also moved under yard rules, it also appears that such movements are made under such conditions that the application of the Act would not promote the safety of travelers.

Surely, if Congress had intended that the Act should be applied to this branch of railroad traffic, it would have said so in unmistakable terms, instead of enacting a law, the terms and provisions of which, in letter and

spirit, and in results to be accomplished, plainly indicate to the contrary.

The truth of the matter is that Congress did not intend to control and regulate every possible movement that might be made upon railroad tracks. It undertook to control the use of air brakes in main line movements from station to station, because those movements are made at high speed, and the conditions under which they are made are uniform throughout the country, and it was and is right and proper that in all such movements power brakes should be used. Switching movements, however, are necessarily made under varying conditions, at different times, and in different terminals, depending upon the amount of traffic from time to time, the size of the terminals, the topography of the country and other considerations which may exist. Some discretion and judgment was intended to be left to the intelligent management of the railroad, and Congress assumed, and rightfully so, that the management would take such measures and precautions in switching operations, both of the ordinary kind and of the more extended variety, as the conditions might demand. In some cases it might not be necessary to use power brakes at all. In other cases the use of some brakes would be advisable, and in other cases the use of a larger percentage of brakes would be advisable; but the use of the entire percentage of air brakes prescribed for trains out on the road in all switching operations was never intended by Congress, and there is nothing in the statute from which any such in-

tention may be deduced. On the contrary the statute as a whole indicates directly the contrary. It is a cardinal principle of interpretation that the intention of the legislative body may be deduced from the statute as a whole and from the subject matter thereof.

Kolsatt v. *Murphy*, 96 U. S. 153; l. c. 159, 160.
Lessee of Henry Brewer v. *Blougher*, 14 Pet. 178; l. c. 198.
Petri v. *Commercial Bank*, 142 U. S. 644, 650.
U. S. v. *Wilburger*, 5 Wheat. 76, 96.

It is apparent from the statute as a whole and the subject matter thereof that the air-brake provisions relate solely to the *running* of *trains* out on the *line*, not to the irregular movements of cars in switch yards; that the air-brake provisions were enacted to minimize the dangers resulting from the speed at which *trains* on the *main* line must necessarily run. The conditions under which *main line* movements and *switch* movements are made are so radically different, that in the absence of any mention of switch movements, generally or specifically, in the air-brake provisions of the Act, there is no logical basis for asserting that Congress intended or could have intended that such provisions should be applied to switch movements of any kind or character.

III.

The application of the provisions relating to the use and operation of power brakes to switching movements, would lead to absurd, ridiculous and oppressive results, and it is apparent from the Act as a whole that this was not intended.

One of the well recognized principles of the interpretation of statutes is that courts will not construe them in such a way as to lead to results which are absurd, oppressive and unjust, and beyond the scope and the purpose of the statute, when a different construction would accomplish the purpose of the act and would avoid such unreasonable results.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, l. c. 37.
Law Ow Bew v. *U. S.*, 144 U. S. 47, l. c. 59.
Washington & Idaho R. R. v. *Coeur, etc., Railway*, 160 U. S. 77, l. c. 101.
Interstate Drainage & Inv. Co. v. *Board of Commissioners*, 158 Fed. 270, l. c. 273.

It is apparent that if the Act should be held to apply in the many switching movements which are made daily in large terminals, the vast amount of additional work to be done, would make it necessary for the railroads to employ hundreds of additional employes, to have many additional switch engines, to increase the size of their terminals, and to make many other changes which would be revolutionary in their character, and would ultimately cost the railroads many millions of dollars, without accomplishing any good purpose.

Conditions existing in terminal yards, and which obtain in connection with such work, are altogether different from those which exist in the running of *trains* out on the *line* between terminals, and it is obvious that if Congress had intended that the Act should apply to switching movements of any character, this would have been made apparent from the terms thereof, instead of using terms, as heretofore indicated, which are ordinarily understood by railroad men to apply *only* to movements of *trains* out on the road.

The terminal problem is one of the many serious problems which now confront the railroads of this country. The tremendous cost of obtaining land for terminal uses in large cities, the congestion which exists, and the increased demands for quick service, add to the difficulty.

The necessity for economizing in railroad operations is becoming more and more apparent as the cost of labor, and of all materials required in railroad construction, maintenance and operations increases, and one of the opportunities for exercising economy in operation is said to be afforded by the revising of terminal facilities.

Droege on Freight Terminals and Trains, p. 10.

The revising of freight terminals in such a way as to reduce operating expenses requires, among other things, the adoption of modern methods of switching cars.

The "push and pull" method of switching now so prevalent in many terminals is said to be neither efficient nor economical, and the author above referred to states that the poling method and the hump or summit method and gravity switching should take the place of the push and pull system whenever it is practicable or possible to do so. The poling and the hump or summit method and gravity switching are recognized as modern methods of switching which will have to be adopted in railroad freight terminals in order that the highest degree of economy may be practiced, but such methods would be out of the question if railroads were required to have all strings of cars in switching movements operated with power brakes.

Obviously, the complicated problems which already exist in the congested terminals of great railroad centers will be greatly increased if by a strained and unnatural construction, the Act is held to apply to switching movements of any kind whatever.

The Government in its brief in the case at bar, says (page 14):

> "However, the hardship is more apparent than real. *The coupling of air brakes on transfer trains would require little time, especially if done by additional yardmen reserved for the purpose and if no tests were made.* Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since most of the cars constituting these transfer trains were moving in through traffic and supposedly had been previously inspected and found to be in good condition."

This statement amounts to a confession that it is impracticable to apply the air brake provisions of the Act to movements of the character involved in this proceeding.

The statute not only requires that a certain percentage of the cars in a train shall have the air brakes *used and operated*, but provides further that *all* power braked cars in such train associated with said percentage shall also have their brakes *used* and *operated* (See Section 2 of the amendment of 1903), so that if any train which comes within the provisions of the Act has all of its cars equipped with power brakes, then *all of them* must have the air brakes *used* and *operated*. Otherwise there will be a violation of the Act.

See,

In re Power or Train Brakes, 11 I. C. C. Rep. 429.

The suggestion in the Government's brief above referred to, amounts to this: that all air brakes may be coupled, but that the testing of them may be omitted, because it would be impracticable, and if they are not all *used* and *operated* under such circumstances the violation should be overlooked. The government apparently would have this court say that the Act applies to the switching transfers of cars insofar as the *coupling* is concerned, but because it is impracticable to test all of the air brakes, the court may strike out that provision of the statute which says that the brakes *must be used and operated*.

This clearly amounts to a suggestion that this court may in effect create a statute entirely different from that enacted by Congress, because under conditions existing in connection with switching transfers of cars in terminal yards, it would not be practicable to extend the air brake provisions of the Act in its present form to cover such switching operations.

IV.

The Act has not been construed by those entrusted with the enforcement thereof so as to include switching operations.

This court has repeatedly announced and applied the rule in the construction of statutes, that where the meaning of a statute is in doubt, and it has been given practical construction by the executive officers charged with the duty of enforcing it, such practical construction is entitled to great weight and consideration in the determination of the true meaning of such statute.

United States v. *Johnston*, 124 U. S. 236, l. c. 253.
United States v. *Moore*, 95 U. S. 760, l. c. 763.
Hahn v. *U. S.*, 107 U. S. 402.
Schells Executors v. *Fauche*, 138 U. S. 562 l. c. 572.
U. S. v. *Hermanos Y. Compania*, 209 U. S. 337 l. c. 339.

The original Safety Appliance Act was adopted by an Act of Congress approved March 2d, 1893, and as amended has been in effect ever since that time. The

fact that the question, whether the Act was intended to apply to *switching movements*, has not been raised or discussed until recently gives rise to the inference, which is a matter of common knowledge, that the Government has never undertaken to enforce the Act as to such movements until quite recently, when it has undertaken to apply it to movements of transfers of cars being switched from place to place within one general terminal yard.

For a period of over twenty years, those entrusted with the enforcement of the air-brake provisions of the Safety Appliance Act have not construed them as applying to ordinary switching movements, and for a period of over fifteen years they have not construed such provisions as applying to switch movements of any character whatever.

During that period this Act has been twice amended to meet new conditions, but Congress was apparently satisfied with the construction placed upon the air-brake provisions of Act applying them only to main line movements, because none of the amendments attempted to correct such construction.

In the case of *United States* v. *Johnston, supra*, Mr. Justice Harlan not only announced the rule above referred to that;

> "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

but he also made mention of the fact that Congress apparently was aware of the construction placed upon the statute in question, and did not intend to disturb it.

In the case of *United States* v. *Hermanos Y. Compania, supra,* Mr. Justice McKenna, after announcing and applying the rule above stated, said:

> "And we have decided that the re-enactment by Congress, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction."

In the case at bar, it is perfectly apparent that if Congress were dissatisfied with the interpretation which has been placed upon the air-brake provisions of the Safety Appliance Act by those in charge of the enforcement thereof in that they have not for years attempted to apply them to ordinary switching operations there has been ample opportunity to amend the Act. This has not been done, and apparently the construction adopted accords with the contentions of Congress. The recent attempt to apply the air-brake provisions to extended switching operations as in the case at bar is without logical basis, and is an arbitrary attempt to widen the scope of such provisions beyond the manifest intent of Congress and the long time practice of the Interstate Commerce Commission.

Not only has the Interstate Commerce Commission uniformly construed the Act not to apply to ordinary switching movements, but in the hearings that have been held at the time that the percentage of air brakes required

to be used and operated was increased, the Interstate Commerce Commission has considered main line movements only, and has never considered the conditions and circumstances which exist in connection with movements within terminal yards. We especially call the court's attention to the language used in discussing the advisability of raising the percentage of cars in trains which must have their brakes used and operated from fifty per cent to seventy-five per cent, in the proceeding entitled "*In re Power or Train Brakes,* 11 Interstate Commerce Commission Reports, 429." Throughout the entire discussion, it is apparent that the Interstate Commerce Commission had in mind movements on the main line. It had no thought of switching movements. It appears from the opinion of the Commission in that proceeding that the railroads were intending to and did co-operate with the Commission to the end that *main line* movements might be made as nearly safe as possible, but no mention was made of movements within terminal yards, and such movements were not discussed nor considered, because neither the Interstate Commerce Commission nor any of the railroads considered such movements to be within the air brake provisions of the Safety Appliance Act.

V.

The decisions of the appellate courts relating to the air brake provisions of the Safety Appliance Act are contrary to the contentions of the Government.

As heretofore stated, the provisions of the Safety Appliance Act include two separate and distinct matters: First, the requirements relating to the equipment, use and operation of power or train brakes, on *trains*, and second, the equipment of *cars* with coupling devices, grab-irons, draw-bars, etc. There is no decision of this court holding that the requirements as to the equipment, use and operation of power and train brakes on *trains* applies to switching movements of any kind or character, and there is no decision of any Appellate Court, so far as we are aware, holding that the requirements as to the equipment, use and operation of power and train brakes applies to switching movements of any character, unless it be in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 198 Fed. 637, which case is relied upon by the Government. That case does not discuss the question as to the proper interpretation of the statute generally, but simply construes the movement involved to be a main line movement of a train, without giving serious consideration to the meaning of the terms of the statute and the general scope, purpose and intent thereof, as indicated by the Act as a whole. It does not appear from the court's opinion whether the movements were being made al-

together within one general terminal yard of one company, nor does it appear whether the transfers were displaying markers so as to come within the definition of the word "train." In fact, most of the vital questions which must determine whether or not the Act applies to this class of traffic were not discussed in that case.

Manifestly, that case cannot be regarded as authoritive upon the precise question under consideration, in the light of the well reasoned and well considered decisions of the Circuit Court of Appeals in this case (211 Fed. 12), and of the Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Erie Ry. Co.*, 212 Fed. 853, and in the same case on a former appeal, 197 Fed. 287; in all of which the question at issue was squarely presented and decided.

The Government cites in its brief (page 9) the following decisions of this court construing the provisions of the Safety Appliance Act, which require that *cars* be equipped with automatic couplers, grab-irons, draw-bars, etc.

Southern Ry. Co. v. *Crockett*, 234 U. S. 725.
Delk v. *St. L. & S. F. R. R. Co.*, 220 U. S. 580.
C. B. & Q. R. R. Co. v. *United States*, 220 U. S. 559.
St. Louis I. & S. Ry. Co. v. *Taylor*, 210 U. S. 281.

As heretofore pointed out, the decisions construing that part of the Act requiring certain equipment for *cars*, have no application to that part of the Act requiring the use of power brakes on *trains*.

In the case of *C. B. & Q. R. R. Co.* v. *U. S.*, 220 U. S. 559, this court very pointedly limits the scope of that part of the decision which relates to automatic couplers in the following language (220 U. S. l. c. 577, italics are ours):

> "In view of these facts we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act *so far as it relates to automatic couples* on trains moving in interstate commerce, and open to further discussion here."

The Government also cites the case of *U. S.* v. *Pere Marquette R. Co.*, 211 Fed. 220. That case was decided by the District Court for the Western District of Michigan, and is based upon a misapprehension and a misconception of the scope of the decisions of this court, construing the provisions of the Act relating to equipment of cars.

In the case of *United States* v. *New York Central & H. R. R. Co.*, 205 Fed. 428, the court held that a movement of thirty-nine freight cars under circumstances very similar to the case at bar was a switching operation, and that the Safety Appliance Act was never intended to apply to switching operations. The court says (page 429):

> "The primary object of the statute was to require railroads to equip trains engaged in interstate traffic with air brake appliances, so as to minimize the dangers to the passengers and crews; but obviously it was never intended to require such appliances to be coupled up or connected while cars are

being hauled by a switching engine from one yard to another, or shunted out at different points, and are not actually engaged in interstate traffic."

Judge Amidon in his opinion in this case, 211 Fed. l. c. 18, strikes the key note to the situation when he points out that the air-brake sections of the Federal Appliance Act were not intended to apply to switching operations, and that the mere fact that those operations have been extended since the passage of the Act does not authorize the courts to extend the application of the Act, but that this is a matter for Congress. Upon this subject he says (211 Fed. l. c. 18, italics ours):

"Because of these results, as well as from the language of the statutes, we are of the opinon, that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the next conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: *First, do the air brake provisions of the Safety Appliance Acts apply to switching operations? Second, was the movement of the strings of cars here involved a good faith switching operation? We are satisfied that the movement of these trains was as genuinely a switch-*

> *ing operation as the old movement when terminal yards were less extended than they are now.* Being of that opinion, and that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff."

In the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, Judge Buffington says (italics ours):

> "It would seem, therefore, that none of these cases involved the question here involved, namely, the compulsory use of air-brake equipment in switching operations. On that question, which is one of statute construction, we hold the act does not compel the air coupling of cars in switching movements. We so hold, amongst others, for these reasons: *First, because had Congress meant to compel air-coupled switching, it would have said so; second, by providing automatic coupling Congress had already provided as far as it could against the avoidable dangers incident to switching; third, if the law includes switching, and Congress meant to except any switching therefrom, it neither did nor by language made it possible to now decide what switching was excepted.*"

Conclusion.

It is conceded by the Government that the air-brake provisions of the Safety Appliance Act do not apply to ordinary switching operations. The evidence establishes conclusively that the movements in question were not main line movements, but were merely a part of the switching operations of the railroad company, each consisting

~~in part~~ of a movement from one point in a terminal yard to another in the same yard. There is nothing in the statute which brings such movements within the scope of the Act, and there is nothing in the circumstances under which the movements were made that requires its application. Clearly, if the Government thinks that this class of switching movements, which is by no means a distinct class of movements, should be brought within the scope of the statute, then it should appeal to Congress and not to the courts. It is apparent, however, that Congress intended that the use of air brakes in all switching operations should be left to intelligent railroad management. Congress presumably recognizes that conditions existing in terminal yards vary in different parts of the country. In some cases the movements from one group of tracks to another in a terminal yard would be a few hundred yards, and in others the distance would be greater. If the entire percentage of cars, and all power-braked cars associated with them, must be coupled in such movements, then revolutionary changes must be made in regard to movements in railroad terminals at an enormous cost. Congress did not intend this. There is no mischief existing in connection with these movements which it is necessary to remedy. The railroad management has provided against and should be permitted to provide against the dangers which arise under different circumstances in different terminal yards. As heretofore pointed it appears that the railroad companies are in good faith at-

tempting to co-operate with the Interstate Commerce Commission, in order that the purpose of the statute may be carried out in main line movements. They should not be harassed with an attempt to apply the statutes to movements to which Congress did not intend they should apply, and especially when such application would be impracticable, oppressive, expensive, and no good would be accomplished thereby.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 630.

THE UNITED STATES, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

Owing to lack of time, due to the fact that the Government was about ten days late in serving its brief herein, the "Brief on Behalf of Respondent," heretofore filed, was limited to a discussion of and answer to the points and argument advanced by the Government under the single specification of error relied upon by it in its brief, to wit, "that the Circuit

Court of Appeals erred in reversing the judgment of the trial court, directing a verdict in its favor, and in holding that the transfer movements in question were switching operations and not within the purview of the safety appliance acts" (Government's Brief, p. 4).

We think, however, that attention should be called to the fact that the record shows, in reference to the second, third, and fourth counts of the complaint here involved, that certain assignments of error were presented to the Circuit Court of Appeals by respondent in addition to those arising in connection with the giving of peremptory instructions to the jury on behalf of the Government and the refusal thereof on behalf of respondent, although the latter were the only ones which it became necessary for the Court of Appeals to discuss under the conclusions reached by it.

We desire also to call attention to some additional authorities in support of the propositions advanced in our original brief.

Assignments of Error Presented to Circuit Court of Appeals by Respondent.

The respondent in the proceedings before the United States Circuit Court of Appeals duly assigned as error the action of the trial court in refusing to instruct the jury peremptorily to return a verdict in its favor upon the second, third, and fourth counts of the complaint, and in giving to the jury peremptory instructions to return a verdict in favor of the Government on those counts. See assignments of error II, III, IV, VI, VII, VIII, and XIII (Record, pp. 95-99).

As stated before, the conclusion which the Court of Appeals reached as to those assignments of error was such that it did not find it necessary to discuss other errors assigned relative to the second, third, and fourth counts.

However, in addition to the foregoing assignments of

error, the respondent asserted and maintained in its assignment of errors, duly presented to the Court of Appeals, that the trial court committed errors as follows (see assignment of errors, Record, p. 98):

"XI.

"In that at the close of the trial when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

" 'No. 7.

" 'The court instructs and charges the jury that if you shall believe that the cars referred to in the second, third, and fourth counts of the complaint, and also referred to by the witnesses as "drags," "cuts," or "transfers" were moved or hauled by the defendant upon its own track and wholly within its own switch yards, and that the only movements thereof were switching movements necessary to be made in the breaking up of trains coming into such switch yards, and the making up of trains to depart therefrom, then you should return a verdict in favor of the defendant on said second, third, and fourth counts.'

"To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted and now assigns the same as error."

"XII.

"In that at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

" 'No. 8.

" 'The court instructs and charges the jury, relative to the second, third, and fourth counts or causes of action set forth in the complaint, that if you shall

believe from the evidence that none of the strings of cars referred to in the complaint, and referred to in the testimony as "drags," "cuts," or "transfers" were "trains," then it is your duty to return a verdict as to each and every of said second, third, and fourth counts in favor of the defendant. And in this connection the court further instructs and charges you that if you shall believe from the evidence that in the railroad business the word "train" has, among railroad men and in railroad parlance in the United States, a fixed, definite, and technical meaning, and so had such meaning on and before March 2, 1893, then it will be and is your duty to apply and to give that word, as used herein and in other parts of these charges and instructions, such meaning, and if, by using and applying such meaning, you shall find and believe that none of the strings of cars above referred to constitute a "train" in such railroad parlance, then it is your duty to return a verdict in favor of the defendant company as to each and every of said second, third, and fourth counts.'

"To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted, and now assigns the same as error."

It is apparent from its opinion herein, that the court of appeals considered the evidence relating to the second, third, and fourth counts of the complaint as though no issues of fact were presented, and we think properly so. The Government has likewise so treated the evidence in its brief. Under the evidence in this case we believe that it is not possible to come to any other conclusion than that the movements in question were switching operations, pure and simple, and that the strings of cars in question were not "trains" within the meaning of the safety appliance act, but if this court should differ with the court of appeals in any of its conclusions upon the assignments of error discussed by it, we desire to have further consideration given to the other assignments of error presented and relied upon.

We do not for a moment concede that there can be any

doubt as to the correctness of the conclusions reached by the court of appeals, but desire merely to call attention to the fact that after the court refused to give the peremptory instructions requested by the respondent, respondent then asked that certain questions be submitted to the jury by appropriate instructions, which instructions were also refused, and the refusal thereof was assigned as error. Undoubtedly the trial court committed error in refusing to give the peremptory instructions requested by respondent, but after such refusal it should at least have given instructions number 7 and 8 above referred to.

Erie Railroad Co. *vs.* United States, 197 Fed., 287; l. c. 290, 291.

Some Additional Authorities.

On page 39 of our original brief we mentioned the fact that there are two distinct classes of movements on railroads, to wit, "main-line movements" and "switching movements." This distinction was recognized by the Circuit Court of Appeals for the Third Circuit in the case of Erie Railroad *vs.* United States, 197 Fed., l. c., 288, 289, where the court said:

> "Indeed the court in its observation of the practical operation of railroads takes judicial notice of the fact that the transportation work of a great modern railway covers two distinct fields of operation: One, the hauling of trains in transit, and the other the assemblage and distribution of the cars into such trains at terminal points."

On pages 41 and 42 of our original brief we stated that it is practically conceded by the Government that the air-brake provisions of the safety appliance act do not apply to ordinary switching operations. We desire to call attention to the fact that this was specifically conceded by Judge Hook in his dissenting opinion in the case at bar, upon which opinion the Government relies. (See p. 117 of the record; also 211 Fed., 12, l. c., 20.)

Judge Hook says (211 Fed., 20):

> "Defendant's contentions which the court sustains are, *first*, that the train-brake provisions of the safety appliance acts (27 Stat., 531; 29 Stat., 85; 32 Stat., 943) do not apply to switching operations; *second*, that the movements of the cars in question were of that character. I will not stop to consider the first of these, except to say that in some switching operations compliance with the requirement in question may be impracticable, and for that reason may not have been enforced as to them."

On pages 50 and 51 of our brief we called attention to the fact that Congress had authorized the American Railway Association to designate the standard height of drawbars, and thus recognized the authority and standing of the association. This court has also recognized the authority of this association.

See:

St. L. & I. M. Ry. *vs.* Taylor, 210 U. S., l. c., 286.

On pages 55 to 59 of our brief we called attention to the fact that movements of the character in question do not come within the mischief which Congress was seeking to remedy. This court recently held to the same effect in construing another provision of the same act. In holding that the act does not require an automatic coupling between the engine and tender of a locomotive, the court stated that the coupling between the engine and tender was "not either within the mischief or remedy of the act."

Pennell *vs.* Railroad, 231 U. S., l. c., 678 (bottom of page).

On page 64 we stated that the air-brake provisions of the act have been construed by those entrusted with the enforcement thereof so as not to include switching operations, and that such construction is entitled to great weight. In addi-

tion to the authorities there cited, we call attention to the language of this court in the case of Pennell *vs.* Railroad, 231 U. S., l. c., 680, where Mr. Justice McKenna says:

> "We need not refer to them (plaintiff's contentions) with further detail except to say that the custom of railroads could not, of course, justify a violation of the statute, *but that custom having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute.*
>
> "Under the various safety appliance acts the Commission is charged with the duty of prosecuting violations of them which come to its knowledge, and by the sundry civil appropriation act of June 28, 1902, c. 1301, 32 Stat., 419, 444, the Commission was authorized to employ inspectors to execute and enforce the requirements of the acts. It is of special significance, therefore, that in its order under the act of April 14, 1910, c. 160, 36 Stat., 298, which was supplemental to the other acts, designating the number, dimensions, location, and manner of application of certain appliances, it provided as follows: 'Couplers: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.' That is, couplers were required where danger might be incurred by the employees."

In this connection we desire also to call specific attention to the following language used by Judge Amidon in his opinion in the case at bar (Record, p. 113; also 211 Fed., 12, l. c., 17):

> "It is not controverted by the Government that the provisions of the safety appliance act in regard to air brakes have not heretofore been regarded as applicable to switching operations. *This has been the interpretation of executive officers charged with the enforcement of the act and is justified by the language of the statute.* The words 'on its line,' in 'moving interstate traffic,' 'to run any such train in such traffic,' are properly applicable to trains moving from point to point rather than switching operations. We do not think the act of 1903 was intended to make any

change in the original statute in this respect. That statute was passed to correct the decision of this court in the case of Southern Pacific Railway Co. *vs.* Johnson (117 Fed., 462) and was mainly declaratory. Johnson *vs.* Southern Pacific, 196 U. S., 1, 21."

The Erie and Santa Fe Cases.

There appear to be only two cases in which questions similar to those in the case at bar, involving a construction of the air-brake provisions of the safety appliance act, have come before any appellate court, to wit, the cases of United States *vs.* Erie Railroad Co. (C. C. A., Third Circuit), 212 Fed., 853, and A., T. & S. F. Ry. Co. *vs.* United States (C. C. A., Seventh Circuit), 198 Fed., 673. The Erie case was also before the same court on a previous appeal (197 Fed., 287). The second judgment of the Court of Appeals in the Erie case is now before this court for review (No. 580 on the docket for this term).

In the Erie case it was held by the Court of Appeals for the Third Circuit that the air-brake provisions of the statute in question do not apply to switching movements, and that the movements involved were *bona fide* switching movements.

In the Santa Fe case the court did not specifically decide whether the air-brake provisions of the act are applicable to switching movements, but, without discussing the general scope, purpose, and meaning of the air-brake provisions of the act, held that the precise movements involved in that case came within those provisions.

We apprehend that the decision of this court in the Erie case and in this case will depend upon a determination of the single broad proposition that the air-brake provisions of the act either do or do not apply to extended switching movements between different points within the same terminal yards, as in this and the Erie cases, it being conceded that those provisions of the act do not apply to "ordinary switching operations," and no question as to such operations is involved.

It is conceivable, however, that this court, after announcing the rule applicable generally, may hold further that whether the movements involved in a particular case are or are not *bona fide* switching movements will depend upon a consideration of the circumstances under which such movements are made, as shown by the evidence in each particular case.

It is, therefore, perhaps not out of place to point out that the movements involved in this case, as shown by the evidence, are even more distinctly and characteristically switching movements than in the Erie case, and much more so than in the Santa Fe case.

In the Erie case the "drags" or movements involved were made up with "markers" of a certain character, because of the necessity of their passing through a tunnel, while in the case at bar the movements involved were made up without a caboose and without markers of any kind or character, *but were made up as all other switching movements.* In the Erie case each of the three places, making up together the terminal yards, was a freight station, having its own published rate, whereas in the case at bar the parts of the yards between which the movements were being made were all in and around the single station of Kansas City, and were not markedly different from all switching movements which took place there. In the Erie case the movements appear to have been operated by special switching crews used for extended switching movements, whereas in the case at bar the movements were made by the same switching crews that did all classes of switching.

The movements in the Erie case were undoubtedly *bona fide* switching movements. There is even less room for doubt, if that be possible, that the movements involved in this case were *bona fide* switching movements.

In the Santa Fe case it appears that the Corwith yard was a terminal entity of itself, and that the Eighteenth Street yard was a terminal entity of itself; that the distance between

the two yards was about eight miles, and that the movements involved were between the two yards. It does not appear where the terminal yard limits were, how the movements were made up, whether they carried markers or cabooses, or what the conditions were generally, which would determine whether such movements were "main-line movements" or "switching movements." In the case at bar it appears that the Twelfth Street yards and Murry yards were operated together as a single terminal entity; that neither yard was complete in itself as a switching unit; that they were both within the terminal yard limits—were, in fact, one yard, except that the river separated them—and that all of the conditions existed in the making of the movements in question which necessarily characterized those movements as "switching movements" as distinguished from "main-line movements."

Summary of Argument.

The argument on behalf of respondent may be summarized as follows:

1. The air-brake provisions of the safety appliance act relate to *trains* as a unit, whereas other provisions of the act relate to *cars* as a unit.

2. The air-brake provisions of the act relate to the *running* of trains, whereas other provisions relate to the *hauling* of cars.

3. There is a marked distinction between the *running* of *trains* and the *hauling* of *cars* and decisions relating to one class of movements do not necessarily apply to the other.

4. The questions involved in this proceeding relate solely to the air-brake provisions of the act, and necessitate a consideration of what class of movements on a railroad constitute the *running* of a *train* within the meaning of the act.

5. Movements of engines and cars on a railroad track consist of two general classes, to wit, "main-line movements"

and "switching operations." It is conceded that the air-brake provisions of the safety appliance act apply to the former, but it is asserted that they do not and cannot apply to the latter.

6. It is conceded by the Government, the courts, and the Interstate Commerce Commission that the air-brake provisions of the act cannot be applied to "ordinary switching operations," but the Government contends that they should be applied to switching operations of an extended character, as in the case at bar.

7. No logical reason is advanced by the Government for applying the air-brake provisions of the act to extended switching operations when they are not and concededly cannot be applied to ordinary switching operations.

8. Movements of the character in question do not come within the specific terms of the act or within the spirit of language and terms of the act as a whole.

9. The movements in question do not come within the meaning of the word "train" as used in the act, and are not so described by railroad men, but are described and referred to by them as "drags" or "cuts" of cars.

10. The purpose, scope, and object of the act necessarily excludes the application of the air-brake provisions to switching movements of any kind or character.

11. The application of the air-brake provisions of the act to switching operations of any kind or character would lead to oppressive and unjust results, and this was not intended.

12. The act has not been construed by those entrusted with the enforcement thereof so as to include switching operations.

13. The appellate courts have almost unanimously declared that the air-brake provisions of the act were not intended to relate to switching operations of any kind.

14. If there is any question under the evidence whether the movements involved were switching operations, and we assert that there is none, then this question at least should

have been submitted to the jury, by the instructions requested.

15. The movements involved in the case at bar were distinctly switching movements in every particular, even more so than in the Erie case (212 Fed., 853), and much more so than in the Santa Fe case (198 Fed., 673).

We again respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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